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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~345~~ 82

WILLIAM R. DAVIE, MARY E. WOOLF, AND HER HUSBAND STEPHEN McP. WOOLF, JOHN McKENZIE DAVIE, ET AL., APPELLANTS,

vs.

B. F. BRIGGS, JOHN O. PETERS, JAMES SLOAN, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

FILED JANUARY 18, 1876.

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Bill for partition and account.

Circuit court of United States of America, western district of North Carolina, at Greensboro'.

WILLIAM R. DAVIE ET AL.
against
B. F. BRIGGS, JOHN O. PETERS, JAMES SLOAN, Moses L. Holmes, Reuben J. Holmes et al. } In equity.

Be it remembered, that on the eleventh day of July, at 5 p. m., 1874, the following bill in equity was filed in the clerk's office of aforesaid circuit court, in words and figures as follows:

Complaint.

THE UNITED STATES OF AMERICA:

Fourth circuit. The western district of North Carolina. In equity.

To the judges of the circuit court of the United States for the western district of North Carolina:

William Richardson Davie, Mary Fraser Woolf, together with her husband Stephen McPherson Woolf, John McKenzie Davie, and Allen Jones Davie, citizens of the State of Texas; Allen Jones Davie,
2 a citizen of the State of Oregon, Sarah Jones Burton, together with her husband, William S. Burton, Rosa B. McKenzie, widow, Julia Evans, widow, Octavia Huggins, widow, and Thomas W. Davie, citizens of the State of Kentucky, bring this their bill against B. F. Briggs, John O. Peters, James Sloan, Moses L. Holmes, and Reuben J. Holmes, citizens of the State of North Carolina; The Belmont Mining Company; The McCulloch Copper and Gold Mining Company, a body corporate and politic under and by the laws of the State of North Carolina; Mary F. Davie, widow of Frederick William Davie, Mary Fraser McCrady, and her husband Edward McCrady the younger, Churchill B. Jones, Frederick E. Fraser, Mary Davie Fraser, Emily G. Fraser, minor, Isabella S. Fraser, minor, Frederick G. Fraser, minor, Eliza G. Burroughs, widow, De Saussure Bull, Henry B. Bull, and Rebecca T. Bull, minor, citizens of the State of South Carolina; and William R. Davie Crockett, minor, and John Jesse Crockett, minor, citizens of the State of Texas.

And thereupon your orators and oratrixes complain and say:

I. That the late Allen Jones Davie, then of the State of South Carolina, having discovered that certain lands in the county of Guilford, in the State of North Carolina, hereinafter more particularly de-
3 scribed, were valuable on account of the deposits of gold, copper, and other valuable ores therein, induced his brother, Frederick William Davie, a person of considerable means, to purchase the said lands, with a view to mining the same to their joint benefit and advantage, and that the said Frederick William Davie did thereupon purchase the same from one John Teague, who, upon the 26th day of January, Anno Domini 1829, conveyed the same to the said Frederick William Davie by the following description, namely: "A certain tract or parcel of land lying and being in the county of Guilford, containing two hundred acres, more or less, a part of a tract bought of William Law, lying on the

waters of Deep River, beginning at a stake, formerly a hickory, near Robert Hodgson's corner; thence, running along Hodgson's line, south 153 poles to a black-oak corner; thence west, on Boon's line, 171 poles, to Porter's corner, a post-oak; then along Porter's line north, 153 poles to a black-jack; then to the first station; containing two hundred acres, or thereabouts," a copy of which deed is herewith filed as Exhibit A, and reference thereunto craved as often as may be necessary in the progress of this cause.

II. That, in pursuance of an understanding between his said brother Allen Jones Davie and himself, the said Frederick William Davie, on the seventh day of August, Anno Domini 1831, sold and conveyed unto
4 their brother, Hyder A. Davie, for and upon the consideration of three thousand dollars, one undivided third part of the said lands; a copy of the deed of the said Frederick William Davie is herewith filed as Exhibit B, and reference thereunto craved as often as may be necessary in the progress of this cause.

III. That, in further pursuance of said understanding between the said brothers, the said Frederick William Davie, on the fifteenth day of January, Anno Domini 1833, in consideration of the premises, executed another deed, whereby he conveyed to Cadwallader Jones, of Orange County, North Carolina, another undivided third part of the said lands—"To have and to hold all and singular the premises aforesaid, being the one undivided third part of the tract of land aforesaid, to him the said Cadwallader Jones and his heirs forever, upon the following trusts, that is to say, in trust, to permit Allen Jones Davie, and Rosa L., his wife, and their children, William R. Davie, Allen Jones Davie, Sally Jones Davie, Rosa B. Davie, and Julia Davie, and such other children of the said Allen Jones Davie and Rosa L., his wife, as may hereafter result from their marriage, to have and receive the rents, profits, and issues of the said premises, and of all mines found thereon, whether now open or hereafter to be opened, for the joint use of the said Allen Jones Davie and his wife Rosa, and their children,
5 during the life of the said Allen Jones Davie, father of the said children, and the receipt of the said Allen Jones Davie last named to the said Cadwallader Jones, his heirs or devisees, for the use, management, rents, and profits of said mine, shall be held and deemed sufficient voucher to the said Cadwallader and his heirs, for the faithful performance of the trust, as well towards the said Allen J. Davie and his wife Rosa, and his children, during the life of the said Allen J. Davie; and after his death, to permit the said Rosa Davie his wife, and the children of the said A. J. Davie, to have and receive the rents and profits of the said premises, and of mines worked thereon, during the life of the said Rosa L. Davie, and after her death to convey the said premises to their said children, and to the issue or issues of such, if any, as may be dead, free, and discharged from all trusts whatsoever; and the said Cadwallader Jones may by will devise said trust with similar limitations and conditions, and he is hereby authorized to sell and convey the said mine, with the consent of the said F. W. Davie and Allen J. Davie, and appropriate the proceeds thereof to the purchase of lands, negroes, or bank-stocks, and apply the same to the uses above named, and under similar conditions, and to fulfil the intentions of the above trusts—a copy of which deed is herewith filed as Exhibit C,
6 and reference thereunto craved as often as may be necessary in the progress of this cause.

IV. That the three brothers, Allen Jones Davie, Hyder A. Davie, and Frederick William Davie, thus became beneficially interested in the

said lands and the mines thereon, each in one undivided third part thereof. The legal title to the undivided third part of the said Allen Jones Davie being in Cadwallader Jones, in trust, for himself, his wife, and his children; and that of the said Frederick William Davie, and his brother Hyder A. Davie, in them respectively.

V. That, subsequently to the execution of the said deed, several other children were born to the said Allen Jones Davie and Rosa L. his wife, of whom there are now living (others having died in infancy) Octavia, born July, Anno Domini 1834, Mary Fraser, born 11 August, 1840, and Thomas Wentworth, born May, 1842.

VI. That the said Rosa L. Davie, wife of the said Allen Jones Davie, departed this life on or about the 26th September, Anno Domini 1843, leaving her said husband and the children above named surviving her.

VII. That the said Allen Jones Davie departed this life, as it is believed, some time in the year Anno Domini 1851, but the precise date of his death is not known, nor can any direct proof thereof be obtained, nothing having been heard from him since day of November, 7 Anno Domini 1851, when some of a party with whom he had undertaken a journey by land to California through the country of hostile Indians, returned, saying that the party had been some time fighting the Indians when they left, but that the said Allen Jones Davie, with the rest of the party, resolved to press on, and fight their way across the country, in which struggle it is believed that he, with the rest of the party, perished, as none of them have ever been heard of since.

VIII. That the said Frederick William Davie departed this life on or about the ninth day of April, anno Domini 1850, leaving a last will and testament duly executed and proved, whereby, after certain specific bequests, he devised as follows: "3d. I will, devise, and bequeath all the rest and residue of my estate, real and personal, to my wife, Mary Davie, during her natural life; and at her death, it is my will that my estate, real and personal, except two small legacies hereafter to be mentioned, be divided into three equal parts, whereof I devise one part to William F. De Saussure, his heirs, executors, and administrators, forever. One other part I devise to my nephew, B. Churchill Jones, and Sarah Rebecca Fraser, the children of my late sister, Rebecca Jones, to them, their heirs, executors, and administrators, forever; and in case of the death of B. Churchill Jones without issue alive at the time of his death, I devise his share of the said one-third to his sister, Sarah 8 Rebecca Fraser, her heirs, executors, and administrators, forever. One other third part I devise to my nephew and niece, William R. Davie Crockett and Mary Fraser Davie, the daughter of my brother, Allen Jones Davie, to them, their heirs, executors, and administrators, forever; and in case of the death of the said William R. Davie Crockett without issue alive at the time of his death, then, and in that case, I devise the share of the said last-mentioned one-third part to his brother, John Crockett, his heirs, executors, administrators, forever." As will more fully appear by reference to the said will, a copy of which is herewith filed as Exhibit D, and reference thereunto craved as often as may be necessary in the progress of this cause.

IX. That the said William F. De Saussure has, since the date of the said will, to wit, on or about the day of , anno Domini 1870, departed this life, leaving a last will and testament duly executed and unrevoked, whereby, after certain specific bequests to his daughter, Eliza Galviella Burroughs, he directed "all the rest and residue of my estate, real and personal, I devise and bequeath to her (that is, to the

said Eliza Galviella Burroughs) and the children of my daughter, Mary D. Bull; that is to say, one-half to my daughter, M'r's E. G. Burroughs, and the other half to the children of my late daughter, Mary D.
9 Bull," as will more fully appear by reference to the said will, a copy of which is herewith filed as Exhibit E, and reference thereto craved as often as may be necessary in the progress of this cause.

X. That at the death of the said William F. De Saussure there were four children of the late M'r's Mary D. Bull living, to wit: Rosa Izard, wife of William B. Guerard, De Saussure Bull, Henry B. Bull, and Rebecca T. Bull; that M'r's Rosa Izard Guerard has since departed this life, intestate and childless, and the said William B. Guerard has assigned and conveyed all his interest under the said wills, as heir at law of his said deceased wife, to the said Rebecca T. Bull, a copy of which assignment is herewith filed as Exhibit F, and reference thereto craved as often as may be necessary in the progress of this cause.

XI. That the following persons are now entitled to take among them the rest and residue of the estate of the said William F. De Saussure, to wit: M'r's Eliza Galviella Burroughs, one-half thereof; and De Saussure Bull, Henry B. Bull, and Rebecca T. Bull the other half thereof.

XII. That the said Sarah Rebecca Fraser departed this life on or about the 21st February, anno Domini 1871, leaving surviving her as heirs at law, her husband, Frederick E. Fraser, and four children, Mary Davie Fraser, born 12 February, anno Domini 1851; Emily G. Fraser, born 10 May, anno Domini 1856; Isabella S. Fraser, born 3rd
10 November, anno Domini 1857; and Frederick G. Fraser, born 26th January, anno Domini 1859, all of whom are still living.

XIII. That the said William R. Davie Crockett, mentioned in the will of the said Frederick William Davie, departed this life on or about the day of , anno Domini 1857, without issue alive at the time of his death, he never having been married; that the said John Crockett, to whom the said testator had devised the share of the said William R. Davie Crockett in case of his death without issue alive at the time of his death, departed this life a short time before the death of the said William R. Davie Crockett, leaving as his only heirs at law two infant children, to wit: William R. Davie Crockett, now about thirteen years of age, and John Jesse Crockett, now about eight years of age.

XIV. That the said Mary Fraser Davie, one of the devisees under the will of the said Frederick William Davie, has, since the death of the said testator, intermarried with Edward McCrady the younger, of Charleston, South Carolina.

XV. That the children of the said Allen Jones Davie mentioned in the said deed from the said Frederick William Davie to Cadwallader Jones, in trust, as aforesaid, and those born after the execution of the said deed, and the issues of such as are dead, are as follows:

First. The issue of William Richardson Davie, eldest son of Allen Jones Davie, who departed this life in January, anno Domini
11 1854, to wit: 1. William Richardson Davie, born 15th June, 1843; 2. Mary Fraser Davie, born 5th September, anno Domini 1845 (now the wife of Stephen McPherson Woolf); 3. John McKenzie Davie, born 24 October, anno Domini 1847; and Allen Jones Davie, born 31 July, anno Domini 1850 (two other children having died intestate and unmarried), all of whom are now citizens of the State of Texas.

Second. Allen Jones Davie, born anno Domini 1825, now a citizen of the State of Oregon.

Third. Sallie Jones Davie, born September, anno Domini 1826, now the wife of William S. Burton, residing in the State of Kentucky.

Fourth. Rosa Belle Davie, born 11 October, anno Domini 1828, widow of H. A. McKenzie, now a citizen of the State of Kentucky.

Fifth. Julia Davie, born 12 September, anno Domini 1831, widow of William Evans, now a citizen of the State of Kentucky.

Sixth. Octavia Davie, born 2 July, anno Domini 1835, widow of Edmund Huggins, now a citizen of the State of Kentucky.

Seventh. Mary Fraser Davie, born 11 August, anno Domini 1840, wife of Edward McCrady, the younger, now a citizen of the State of South Carolina.

Eighth. Thomas W. Davie, born 7th May, anno Domini 1842, now a citizen of the State of Kentucky.

XVI. That the said Cadwallader Jones departed this life on or about the 5th February, anno Domini 1861, leaving a last will and testa-
12 ment, but making no devise therein of the trust as provided in the said deed to him from the said Frederick William Davie.

XVII. That your orators and oratrixes are informed and believe that the said Hyder A. Davie, who died some time in the year 1848, devised his estate, real and personal, to the said Frederick William Davie, one Lewis F. Beckham, and the said William F. DeSaussure, for the use of his daughter Julia, his only child, the wife of R. S. Bedon, and at her death, in trust for the children.

XVIII. That your orators and oratrixes have also heard that the said Lewis A. Beckham, during the last illness of the said Frederick William Davie, obtained from him two deeds, one of an interest in the said lands and mines to him individually for his life, and the other of a further interest therein to him as such trustee of M'r's Julia Bedon; and they are informed and believe that the said Lewis A. Beckham has lately departed this life.

XIX. That your orators and oratrixes have also been informed and believe that the said Lewis a Beckham sold or leased certain interests in the said lands to certain persons, to wit, to B. F. Briggs, John O. Peters, James Sloan, Moses L. Holmes, and Reuben J. Holmes, who entered upon the said lands as tenants, in common with the other owners thereof, and worked and mined the same for several years.

13 XX. That, as your orators and oratrixes are also informed and believe, the said Lewis A. Beckham, John Peters, James Sloan, Moses L. and Reuben J. Holmes have since sold their interest in the same to a company known as the Belmont Mining Company; but whether the said company was ever incorporated, your orators and oratrixes are not informed, and have not been able to learn.

(Amended complaint, filed in office October 15, 1874, & copied on page 196 of this transcript.)

XXI. That your orators and oratrixes are also informed and believe that the said Belmont Mining Company afterwards, to wit, on the 11th November, anno Domini 1854, conveyed the said lands and mines thereon to the McCulloch Copper and Gold Mining Company, a body politic and coporate under and by the laws of the State of North Carolina, which corporation is now in possession thereof.

XXII. That your orators and oratrixes are also informed and believe that the said Lewis A. Beckham, John Peters, Moses L. Holmes, and Reuben J. Holmes, and the said the Belmont Mining Company, and the McCulloch Copper and Gold Mining Company, and other persons whose names are at this present unknown to your orators and oratrixes, but whose names, when discovered, your orators and oratrixes pray may be made parties hereto, with proper and apt words to charge them, while in

possession of the said lands as cotenants and copartners of your
14 orators and oratrixes, worked the same, and extracted therefrom large amounts of gold and sold the same for large sums of money, and derived great profits therefrom; but to what precise amount your orators and oratrixes have no means of knowledge.

XXIII. That your orators and oratrixes have *have*, in a friendly manner, by themselves and their agents, applied to the said defendants and have requested them to join with your orators and oratrixes in making a fair partition and division of the said lands among them, or such of them as are really interested therein, so that each party may enjoy his or their own part in severalty, and the said defendants, or some of them, having in their, his, or her custody or power several deeds and writings relating to the said estate, your orators and oratrixes have in like manner requested them to deposit the same in the hands of some indifferent persons, so that the same may be preserved for the benefit of all persons interested; and also have required the said defendants to come to a full and true account with your orators and oratrixes for the rents, profits, and issues of the said lands and mines, and of the sale of any part or parts thereof, or of any interest therein, and your orators and oratrixes had well hoped the said defendants would have complied with such your orators' reasonable requests. But now, so it is, may it please your honors, that the said defendants combining and confederating together to and with
15 each other and with divers other persons at present unknown to your orators and oratrixes, whose names, when discovered, your orators and oratrixes pray may be herein inserted, and they made parties defendants hereto, with proper and apt words to charge them, and contriving how to injure and oppress your orators and oratrixes in the premises, sometimes pretend that your orators and oratrixes have no interest in the said lands and mines, whereas your orators and oratrixes charge the contrary thereof to be the truth, and that they, together with the said Mary F. McCrady, are entitled to one-third of the said lands and mines thereon, and to an account of the rents, profits, and issues thereof during the time that the said defendants or any of them worked or mined the same.

All of which actings and doings are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orators and oratrixes in the premises.

In tender consideration whereof and forasmuch as your orators and oratrixes are remediless in the premises at and by the direct and strict rules of common law, and cannot have adequate relief save in a court of equity where matters of this and the like nature are properly cognizable and relievable:

To the end therefore that the said B. F. Briggs, John O. Peters, James Sloan, Moses L. Holmes, and Reuben J. Holmes, and the said the Belmont Mining Company, the McCulloch Copper and Gold Mining Company, the said Mary F. Davie, Mary Fraser McCrady, and her
16 husband Edward McCrady the younger, Churchill B. Jones, Frederick E. Fraser, Mary Davie Fraser, Emily G. Fraser, Isabella S. Fraser, Frederick G. Fraser, Eliza G. Burroughs, DeSaussure Bull, Henry B. Bull, and Rebecca T. Bull, William R. Davie Crockett, and John Jesse Crockett, and the rest of their confederates when discovered may upon their several and respective corporal oaths full, true, direct and perfect answer make to all and singular the matters hereinbefore stated and charged as fully and particularly as if the same were hereinafter repeated, and they thereto distinctly interrogated, and that no only as to their knowledge and remembrance, but as to the best of their several and respective information, hearsay and belief, and the part

and shares just' belonging to the said plaintiffs, and all other parties hereinbefore named, of and in the said lands and mines may be settled and ascertained, and that a fair partition and division may be made between the plaintiffs and all other persons who shall appear to be interested therein, and that the particulars thereof may be from thenceforth held and enioyed by them, and each of them, their, and each of their heirs, in severalty, and that the same may be conveyed to them, and their heirs forever, free from all incumbrances, and that all proper parties may join in such conveyances, and that possession of such particulars may be delivered to the plaintiffs respectively, and that in
17 the mean time one or more proper persons may be appointed to receive the rents, issues, and profits of the said lands and mines for the benefit of the plaintiffs and all other persons interested, and that such rents, issues, and profits may be divided and paid between the plaintiffs and such other persons according to their respective rights and interests therein, and that all the title-deeds and writings relating to the said lands or to any of them may be brought into this honorable court, and deposited for the benefit of the plaintiffs and the other persons interested therein, and that the said defendants may come to a full and fair account for the value of all gold and other ores and minerals mined from the said lands, and of all sales thereof, and of all and every sum and sums of money which hath and have from time to time by them or any of them, or by their order, or by the orders of any of them, or for the use of them, the said defendants, or either of them, in respect of any sale or contract for the sale of any of the said lands, or any part or parts of thereof, and that they may be required to answer whether or not they have made any such sale or contract of sale, and if so, to whom and upon what terms, and that they may come to an account for and in respect of any rents and other profits and emoluments of or belonging, or incident to the said lands and mines, and which became due between the said plaintiffs and defendants, and that your orators and oratrixes
18 may have the election either to confirm any sale or contract of sale of the said lands, or any part thereof made by the said defendants or any of them, and when confirmed to require and have an account of the proceeds of such sale if made, and that your orators and oratrixes may have such other and further relief in the premises as to your honors shall seem meet and their case require.

May it please you honors to grant unto your orators and oratrixes a writ of subpœna to be directed to the said B. F. Briggs, John O. Peters, James Sloan, Moses L. Holmes, Reuben J. Holmes, The Belmont Mining Company, The McCulloch Copper and Gold Mining Company, Mary F. Davie, Mary Fraser McCrady and Edward McCrady the younger, her husband, Churchill B. Jones, Frederick E. Fraser, Mary Davie Fraser, Emily G. Fraser, Isabella S. Fraser, Frederick G. Fraser, Eliza G. Burroughs, DeSaussure Bull, Henry B. Bull, and Rebecca T. Bull, William R. Davie Crockett, and John Jesse Crockett, thereby commanding them by a certain day and under a certain penalty therein to be inserted, to be and appear before your honors in this honorable court then and there to answer the premises, and to stand to and abide such order and decree therein as to your honors shall seem agreeable to equity and good conscience, and your orators and oratrixes will ever pray and so forth.

J. H. DILLARD &
EDWARD McCRADY, J'R,
Atty's for Compl'ts.

19 EXHIBIT A.

Deed. Teague to Davie.

STATE OF NORTH CAROLINA,
Guilford County:

This indenture, made and entered into between William F. Davie, of the State of South Carolina, district of Chester, of the one part, and John Teague, of the State of North Carolina and county of Guilford, on the witnesseth:

That John Teague, for and in consideration of six thousand dollars to him in hand paid, the receipt whereof is hereby acknowledged, hath this day bargained, sold and delivered to the said William F. Davie a certain tract or parcel of land lying and being in the county of Guilford, containing two hundred acres, more or less, a part of a tract bought of William Law, lying on the waters of Deep River, beginning at a stake formerly a hickory, now Robert Hodgson's corner, thence running along Hodgson's line south 153 poles to a black-oak corner; thence west on Boon's line 171 poles to Partes' corner, a post-oak; then along Partes' line north 153 poles to a black-jack; then to the first station; containing two hundred acres or thereabouts, and I, the said John Teague, do hereby bargain, sell, convey in fee-simple, and the said premises, with all the mines, minerals, and appurtenances thereto belonging, to him the said William F. Davie, his heirs and assigns forever, and I hereby bind myself, my heirs and executors, to defend the said lands against all persons claiming or to claim the same, as witness my hand and seal this 26th day of January, 1829.

JOHN + (his mark) TEAGUE. [SEAL.]

Witness present:
JESSE GALLIMORE.
JOHN B. EDMONSEN.

20 *Lease. Horney to Davie.*

Know all men that I, Phillip Horney, hath this day bargained and sold to W. F. Davie all my right, title, and interest in and to lease held of John Teague to a certain gold mine, and I hereby relinquish all title, interest, and claim to the same, as witness seal and signature, this 26th of January, 1829.

PHILLIP HORNEY. [SEAL.]

STATE OF NORTH CAROLINA:

This day came Jesse Gallimore, one of the subscribing witnesses, before me, William Norwood, one of the judges of the superior court of law and equity of this State, and, being duly sworn, proved the execution of this deed.

Let it be registered.

WM NORWOOD.

21 EXHIBIT B.

Deed of F. W. Davie to H'y A. Davie.

STATE OF SOUTH CAROLINA,
Chester District:

Know all men by these presents that I, Frederick W. Davie, of the

State and district aforesaid, for and in consideration of three thousand dollars to me in hand paid, the receipt whereof is hereby acknowledged, have bargained, sold, and released, and by these presents do bargain, sell, and release to the said Hyder A. Davie, one undivided third of a certain tract of land, lying and being in the State of North Carolina and in the county of Guilford, on the waters of Deep River, and on the western side of said river, being the land I bought of John Teague, known as Horney's gold mine, adjoining the lands of David Lindsay Hodgson, and others, containing two hundred acres, more or less: To have and to hold all and singular the above undivided third, together with all emoluments and profits thereunto arising to him, the said Hyder A. Davie, his heirs and assigns forever; and I do hereby covenant and agree to warrant and defend the same to him, the said Hyder A. Davie, against all persons whatsoever claiming, or to claim, the same, or any part thereof.

In witness whereof I have hereunto set my hand and seal this seventh day of August, 1831.

F. W. DAVIE. [SEAL.]

Signed in the presence of—
EDWARD BELL.
ROBERT HARTNESS.

SOUTH CAROLINA,
Chester District:

Personally appeared Robert Harness, and made oath that he saw F. W. Davie sign, seal, and deliver the within deed for the use and purposes within mentioned, and that he, together with Edward Bell, witnessed the due execution thereof.

ROBERT HARTNESS.

Sworn to and subscribed this 3rd day of Jan'y, 1832, before me.
D. G. SILLEGISEE, *J. P.*

NORTH CAROLINA, *ss:*

The above deed was proven before me in due form of law by the oath of Edward Bell, the witness.

Let it be registered.

JAMES CHARTER, *J. C.*

22 EXHIBIT C.

Deed of F. W. Davie to Cad. Jones.

STATE OF SOUTH CAROLINA,
Chester District:

Know all men by these presents that I, F. W. Davie, of the district and State aforesaid, in consideration of one dollar in hand paid, and for divers other considerations, me thereunto moving, have granted, bargained, sold and released, and by these presents do grant, bargain, sell, and release unto Cadwallader Jones, of Orange County, North Carolina, and his heirs forever, upon the trusts hereinafter set forth, one undivided third part of a tract of land, containing two hundred acres, more or less, lying in the county of Guilford, State of North Carolina, on the waters of Deep River, and on the west side thereof, bounded by the lands of Lindsay Hodgson and others, which said tract of land was purchased

by me from John Teague, and is commonly known by the name of Horney's gold mine, with all the rights, privileges, and appurtenances to the said undivided third part of the said tract of land aforesaid, to him, the said Cadwallader Jones, and his heirs forever, upon the following trusts, that is to say, in trust to permit Allen Jones Davie and Rosa L. Davie, his wife, and their children, William R. Davie, Allen Jones Davie, Sally Jones Davie, Rosa B. Davie and Julia Davie, and such other
23 children of the said Allen Jones Davie and Rosa L., his wife, as may hereafter result from their marriage, to have and receive the rents, profits, and issues of the said premises, and of all mines found thereon, whether now open or hereafter to be opened, for the joint use of the said Allen Jones Davie and his wife Rosa, and their children, during the life of the said Allen Jones Davie, father of the said children, and the receipts of the said Allen J. Davie, last named, to the said Cadwallader Jones, his heirs or devizees, for the use, management, rents, and profits of said mine, shall be held and deemed a sufficient voucher to the said Cadwallader and his heirs for the faithful performance of the trust, as well towards the said Allen Jones Davie as his wife Rosa, and his children, during the life of the said Allen J. Davie, and, after his death, to permit the said Rosa Davie, his wife, and the children of the said A. J. Davie to have and to receive the rents and profits of the said premises and of all the mines worked thereon, during the life of the said Rosa L. Davie, and, after her death, to convey the said premises to their said children and to the issue or issues of such, if any, as may be dead, free and discharged from all trusts whatever, and the said Cadwallader Jones may by will devise the said trusts, with similar limitations and conditions; and he is hereby authorized to sell and convey the said mine, with the consent of the said F. W. Davie and Allen J. Da-
24 vie, and to appropriate the proceeds thereof to the purchase of lands, negroes, or bank-stocks, and apply the same to the uses above named, and under similar conditions, to fulfil the intentions of the above trust.

And whereas the above-mentioned mine has been worked as a joint concern under the management of the said F. W. Davie, and the accounts of the same are yet unsettled, now this conveyance of the one-third of said tract of land and mine or mines is made upon the express condition that the said third hereby conveyed is to be subject to and liable for one-third of whatever amount may be ascertained, on a settlement, to have been expended by the said F. W. Davie in working said mine heretofore, and the said Cadwallader Jones is to pay and satisfy the same out of their rents, issues, and profits of the premises hereby conveyed in trust to him as aforesaid.

And I, the said F. W. Davie, do hereby bind myself to warrant and forever defend all and singular the said premises unto the said Cadwallader Jones against myself and my heirs, and all persons lawfully claiming or to claim the same under me or them, but against the lawful claims of no other person or persons whatever.

In witness whereof I have hereunto set my hand and seal this fifteenth day of January, in the year of our Lord one thousand eight hundred and thirty-three.

F. W. DAVIE. [L. S.]

Signed, sealed, & delivered in presence of—
H'Y A. DAVIE.

Having to A. J. Davie four hundred and fifty-nine dollars, I do also make the above conveyance answerable to the above demand.

F. W. DAVIE. [L. S.]

H'Y A. DAVIE.
ALEX'R CRAWFORD.

25 EXHIBIT D.

Will of F. W. Davie.

SOUTH CAROLINA:

I, F. W. Davie, of the district of Chester, in the State aforesaid, do hereby declare this to be my last will and testament.

1st. I devise and bequeath to my wife, Mary Davie, and her heirs forever, all the right, title, and interest which I acquired in her estate, real and personal, by virtue of my intermarriage with her.

2nd. I bequeath to my wife, Mary Davie, and her heirs forever, the following nine negro slaves, to wit: Fred, and his wife Amy, and their four children, Charles, William, John, and Caroline, and Harriet and her two children, and Jimmy.

3rd. I will, devise and bequeath all the rest and residue of my estate, real and personal, to my wife, Mary Davie, during her natural life-time, and at her death it is my will that my estate, real and personal, except two small legacies hereafter to be mentioned, be divided into three equal parts, whereof I devise one part to William F. De Saussure, his heirs, executors, and administrators forever; one other part I devise to my nephew and neice, B. Churchill Jones and Sarah Rebecca Fraser, the children of my late sister, Rebecca Jones, to them, their heirs, executors, and administrators forever, and in case of the death of B.
26 Churchill Jones without issue alive at the time of his death, I devise his share of the said one other part to his sister, Sarah Rebecca Fraser, her heirs, executors, administrators forever; one other third part I devise to my nephew and neice, William R. Davie Crockett and Mary Fraser Davie, the daughter of my brother Allen J. Davie, their heirs, executors, and administrators forever, and in case of the death of the said William R. Davie Crockett without issue alive at the time of his death, then and in that case I devise his share of the last-mentioned one-third part to his brother John Crockett, his heirs, executors, and administrators forever.

4th. At the death of my wife, Mary F. Davie, I bequeath to Isaac Moncrief and his heirs, executors, and administrators forever, the following four negro slaves, to wit: Bessie and her son John, and Ann and her daughter Riggy.

5th. At the death of my wife, Mary Davie, I bequeath to Thomas Whiteside, his heirs, executors, and administrators forever, one negro boy named Oseola.

I appoint Frederick G. Fraser and William D. De Saussure executors of this my last will and testament.

Witness my hand and seal this eighteenth day of March, 1850.

F. W. DAVIE. [SEAL.]

Signed, sealed, and published by the testator as and for his last will and testament, in our presence, who, in his presence and in the presence of each, have subscribed our names as witnesses hereto.

HENRY J. CULP.
R. E. WYLIE.
J. S. PRIDE.

27 In the court of ordinary, April 26th, 1850.

SOUTH CAROLINA,
Chester District:

Personally appeared in open court J. S. Pride, who, upon being duly sworn, saith upon oath that he was present and saw F. W. Davie sign, seal, publish, and declare this writing to be and contain his the said F. W. Davie's last will and testament, & further saith the said F. W. Davie was then of sound and disposing mind, memory, and understanding, to the best of his deponent's knowledge and belief; and further saith that he, this deponent, did sign his name as a witness thereto, with Henry J. Culp and Richard E. Wylie, in the presence of each other, in the presence of the testator, and at his request.

J. S. PRIDE.

Sworn to and signed date above.

PETER WYLIE,
Ordinary.

APRIL 26TH, 1850.

Frederick G. Fraser, named executor, appeared in open court, and was qualified as executor.

P. WYLIE, *Ord'y.*

APRIL 21ST, 1852.

W'm D. De Saussure, named executor, came into open court, & was qualified as such.

P. WYLIE, *Ord'y.*

28 EXH'BIT E.

Will of W. F. Desaussure.

SOUTH CAROLINA,
Richland District:

I, William F. Desaussure, declare the following to be my last will and testament:

I bequeath to my daughter, M'r's Eliza Gabriella Burroughs, the policy on my life for four thousand dollars in the Southern Mutual Life Insurance Company. The policy stands in her name, and was taken out for her benefit.

All the rest and residue of my estate, real and personal, I devise and bequeath to her and the children of my late daughter, M'r's Mary D. Bull; that is to say, one-half to my daughter, M'r's E. G. Burroughs, and the other half to the children of my late daughter, M'r's Mary D. Bull.

This devise of the rest and residue is to be taken, however, subject to the bequests which follow.

To that true man, my generous-hearted friend, Col. James D. Blanding, I bequeath all the books in my law library marked with his name, or that of his partner, Captain Richardson, and I bequeath to him also the oil painting of my father, the late Chancellor De Saussure, his grandfather. May the Almighty bless and prosper him.

To my granddaughter, M'r's Sally Wallace, I bequeath the marble top sideboard and the large mirror over the mantle-piece, in her parlor.

To my grandson, Hamilton Boykin, I give and bequeath the silver pitcher and waiter, the gift to me of my honored and valued friend Governor John L. Manning and his brother Richard.

I have made no bequests to my dear daughter Sally Boykin, nor to her children, except the above. They will understand the reason. They have my affection and my blessing, but the war has crushed the other branch of my family, for which I feel deep solicitude. The remarkable sagacity, prudence, and good management of my friend A. Hamilton Boykin has saved his family from want.

I bequeath to my daughter M'r's E. G. Burroughs my gold watch and my gold spectacles, and I constitute her executrix of my will, with power to make the necessary partition, without resort to any court or any (illegible.)

In witness whereof I have hereunto set my hand and seal this day of , in the year of our Lord one thousand eight hundred and sixty-eight.

W. F. DE SAUSSURE. [SEAL.]

Signed, sealed, and published by the testator as and for his last will and testament in our presence, who, in his presence & at his request, have signed our names as witnesses.

Before attestation of the witnesses I add the following codicil:

Codicil.

I give and bequeath to my friend Ed. Boykin Cantey, husband of my dear granddaughter, M'r's Mary W. Cantey, the magnifying eyeglasses which I have worn in my pocket for fifty years. Gen. Davie wore them to his death.

This is my will.

W. F. DE SAUSSURE. [L. S.]

Let the wit. sign here.

S. J. BOYLSON.

D. B. DE SAUSSURE.

F. H. TRENHOLM.

Probate of W. F. De Saussure's will.

THE STATE OF SOUTH CAROLINA,
Richland County:

By William Hutson Wigg, esquire, judge of probate of said county. Personally appeared before me Douglas B. De Saussure, who, being duly sworn, made oath and saith that he saw William F. De Saussure sign, seal, publish, pronounce, and declare the annexed instrument of writing, bearing date the day of , 1868, to be and contain his last will and testament; that he, the said William F. De Saussure, was then of sound and disposing mind, memory, and understanding, according to the best of deponent's knowledge and belief, and that the said D. B. De Saussure, with S. J. Boylson and F. H. Trenholm, at the request of the testator, in his presence and in the presence of each other, witnessed the due execution thereof.

D. B. DE SAUSSURE.

Sworn to and subscribed before me this twenty-eighth day of March, A. D. 1870.

WILLIAM HUTSON WIGG,
Judge of Probate.

31 EXHIBIT F.

Quitclaim deed of W. B. Guerard to Rebecca T. Bull.

Know all men by these presents that I, William B. Guerard, in consideration of natural love and affection, and of the sum of one dollar to me in hand paid by Rebecca Theodosia Bull, the receipt whereof I do hereby acknowledge, have remised, released, and forever quitclaimed, and by these presents do remise, release, and forever quitclaim, unto the said Rebecca Theodosia Bull, and to her heirs and assigns forever, all the estate, right, title, claim, and demand whatsoever, both at law and in equity, which I, the said William B. Guerard, have of, in, to, or out of all and singular the estate of the late Col. Frederick William Davie and of the late William F. De Saussure, as heir at law and distributee of her sister, my late wife, Rosa Izard Guerard, so that neither I, the said William B. Guerard, my heirs or assigns, or any other person or persons in trust for me or them, or in my names or in the names, right, or stead or any of them, shall or will, can or may, by any means or ways whatsoever hereafter have, claim, challenge, or demand of, in, to, or out of the same, or any of them, or any part thereof; but that I, the said William B. Guerard, my heirs and assigns, and every of them, from all estate, right, title, interest, property, claim, and demand of, in, to, or out of the same, or any part thereof, are, is, and shall be by these presents forever excluded and debarred.

In witness whereof I have hereunto set my hand and seal this 4th day of March, anno Domini 1874.

W. B. GUERARD. [SEAL.]

Signed, sealed, and delivered in our presence:
ROBERT N. GOURDIN.
ROBERT GOURDIN GAILLARD.

STATE OF SOUTH CAROLINA,
Charleston County:

Personally appeared before me Robert N. Gourdin, and made oath that he saw William B. Guerard sign, seal, and as his act and deed deliver the within written, and that he, with Robert N. Gourdin, witnessed the execution thereof.

ROBERT N. GOURDIN.

Sworn to before me this eighth day of April, anno Domini 1874.
ALONZO J. WHITE,
N. P. & Magistrate, ex off.

32 *Writs of subpœna.*

And on the 18th day of July, 1874, the equity subpœna writs were issued for the following-named defendants in words as follows:

Fourth circuit.

UNITED STATES OF AMERICA,
Western District of North Carolina, ss:

The United States of America to B. F. Briggs, John O. Peters, James Sloan, Moses L. Holmes, Reuben J. Holmes, the Belmont Mining Company, and the McCulloch Copper and Gold Mining Company, citizens and residents of the State of North Carolina:

We command you and every one of you that you appear before the

judges of our circuit court of the United States of America for the western district of North Carolina, at the office of the clerk of the said court, in the town of Greensboro', in said district, on the first Monday in the month of September next, to answer the bill of complaint of William Richardson Davie et al., of the States of South Carolina, Kentucky, and Texas, filed in the clerk's office of said court in said town of Greensboro', then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the western district of North Carolina to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Greensboro', in said district, the first Monday in July, 1874, and in the ninety-ninth year of the Independence of the United States.

Issued the 18th day of July, 1874.

JNO. W. PAYNE.

MEMORANDUM.—The within-named defendants are notified that unless they enter their appearance in the clerk's office of said circuit court, at Greensboro' aforesaid, on or before the day to which the within writ is returnable, the complaint will be taken against them as confessed, and a decree entered accordingly.

JNO. W. PAYNE,
Clerk.

33 On the aforesaid eleventh day of July, 1874, the following order was filed, and certified copies thereof issued on the 13th day of July, 1874:

THE UNITED STATES AMERICA:

Fourth circuit. The western district of North Carolina. In equity.

Writs of subpœna.

Order upon absent defendants to appear, plead, &c., & for service thereof.

WILLIAM R. DAVIE ET AL.
vs.
B. F. BRIGGS, JOHN O. PETERS, JAMES SLOAN, Moses L. Holmes, and Reuben J. Holmes et al.

It appearing that the following persons, parties defendants in this cause, are not residents of the State of North Carolina and cannot be found therein, but that Mary F. Davie, Mary F. McCrady, and Edward McCrady the younger, her husband; Churchill B. Jones, Frederick E. Fraser, Mary D. Fraser, Emily G. Fraser, Isabella S. Fraser, Frederick G. Fraser, Eliza G. Burroughs, De Saussure Bull, Henry B. Bull, and Rebecca T. Bull are citizens of the State of South Carolina and reside in said State, and that William R. D. Crockett and John J. Crockett are citizens of the State of Texas and reside in said State, it is ordered that the said absent defendant' do appear, plead, answer, or demur to
34 the complainants' bill on or before the 1st Monday of Sept. next, and that Henry A. M. Smith, of the State of South Carolina, be, and is hereby, appointed to serve this order upon the said defendants residing in the State of South Carolina, and A. W. Towland to serve the same upon the defendants residing in Texas.

ROB'T P. DICK,
Judge.

Marshal's return.

On the aforesaid 1st Monday in September, 1874, the U. S. marshal of the aforesaid district made return that he had executed process upon James Sloan, Moses L. Holmes, and Reuben J. Holmes, three of the within-named defendants, and B. F. Briggs not to be found. John O. Peters, defendant, had been dead ten years, and after due search no one representing the Belmont Mining Company or the McCulloch Copper and Gold Mining Company could be found.

And on the rule day aforesaid the orders heretofore filed were returned with the following acknowledgments endorsed: "We acknowledge legal service of this order 16th June, 1874. Mary F. Davie, Mary F. McCrady, Edward McCrady, jun., C. B. Jones, Fred. E. Fraser, M. D. Fraser, E. G. Burroughs, DeSaussure Bull, Henry B. Bull," and that due service had been made on William R. D. Crockett and John J. Crockett.

35 And on the aforesaid rule day in Sept., 1874, the following answer was filed in the above entitled cause, to wit:

Answer of Mary F. McCrady & Edward McCrady the younger.

THE UNITED STATES OF AMERICA:

Fourth circuit. The western district of North Carolina. In equity.

The answer of Mary F. McCrady and her husband, Edward McCrady the younger, citizens of the State of South Carolina, who have been impleaded with B. F. Briggs, John O. Peters, James Sloan, Moses L. Holmes, and Reuben J. Holmes, citizens of the State of North Carolina; Mary F. Davie, Churchill B. Jones, Frederick E. Fraser, Frederick G. Fraser, Eliza G. Burroughs, DeSaussure Bull, Henry B. Bull, and Rebecca T. Bull, citizens of the State of South Carolina, and William R. Davie Crockett and John Jesse Crockett, citizens *citizens* of the State of Texas, to the bill of complaint of William R. Davie, Mary F. Woolf, and John M. Woolf, her husband; John M. Davie and Allen J. Davie, citizens of the State of Texas, and Allen J. Davie, a citizen of the State of Oregon; Sarah J. Burton, and her husband, William S. Burton, Rosa McKenzie, Julia Evans, Octavia Huggins, and Thomas W. Davie, citizens of the State of Texas.

These defendants, now and at all times saving and reserving to themselves all and all manner of benefit and advantage of exception
36 that can or may be had or taken to the many errors, insufficiencies, and other imperfections in the said complainants' said bill of complaint contained, for answer thereto, or unto so much thereof as these defendants are advised is material or necessary for them to make answer unto, answer and say:

1. That the said Mary F. McCrady was a minor at the time of the various transactions mentioned and set forth in the complainants' said bill of complaint.

2. That the said Mary F. McCrady has been informed and believes and alleges it to be true that her late uncle Frederick William Davie, did execute and deliver the deed to the late Cadwallader Jones mentioned in the complainants' said bill of complaint, a copy whereof is filed with the said bill as Exhibit C, whereby an undivided third part of the lands and mines therein mentioned were conveyed to the said Cadwallader Jones in trust for her said father Allen Jones Davie and his wife Rosa

L. Davie and their children therein mentioned and such as should be born thereafter. That she and her brother Thomas W. Davie, one of the complainants in the said bill were born after the execution of the said deed and these defendants claim the benefits of the said conveyance to the said Cadwallader Jones as cestue que trust under the said deed.

3. That these defendants believe it to be true and do allege that the said Frederick William Davie died as stated in the said complainants' bill, leaving the said last will and testament mentioned in the
37 said bill, a copy of which is filed with the said bill as Exhibit D, whereby after certain specific bequests he devised the rest and residue of his estate to his wife Mary F. Davie, one of these defendants, co-defendants for life with remainder over to several persons in several portions, whereof this defendant, Mary F. McCrady, is so entitled in remainder with the representatives of John Crockett to one-third thereof.

4. And these defendants denying any manner of unlawful combination hope that the prayer of the bill of complaint will be granted, and the partition and account asked for may be decreed, and submit their rights to this honorable court.

M. F. McCRADY.
EDWARD McCRADY, JUN.

THE UNITED STATES AMERICA:

Fourth circuit. Western district of North Carolina.

Personally appeared before me Edward McCrady, jun., one of the defendants in the foregoing answer named, and made oath that the matter, facts, and things therein stated as far they are derived from his own knowledge are true, and as far as they are derived from the information of others he believes them to be true.

EDWARD McCRADY, JUN.

Sworn to before me this 13 Aug., 1874.

DANIEL HORLBECK,
C. D. C. U. S. for S. C.

38 *Answer of C. B. Jones, F. E. Fraser, M. D. Fraser, E. G. Burroughs, De S. Bull, & H. B. Bull.*

THE UNITED STATES OF AMERICA:

Fourth circuit. The western district of North Carolina. In equity.

The joint and several answer of Churchill B. Jones, Frederick E. Fraser, Mary D. Fraser, Eliza G. Burroughs, widow; De Saussure Bull and Henry B. Bull, citizens of the State of South Carolina, who have been impleaded together with B. F. Briggs, John O. Peters, James Sloan, Moses L. Holmes, and Reuben J. Holmes, citizens of the State of North Carolina; the Belmont Mining Company, and the McCulloch Copper and Gold Mining Company, a corporation of the State of North Carolina; Mary F. Davie, widow, and Mary F. McCrady and her husband, Edward McCrady, the younger; Emily G. Fraser (minor), Isabella S. Fraser (minor), Frederick G. Fraser (minor), Rebecca T. Bull, minor, citizens of the State of South Carolina, and William R.

D. Crockett and John Jesse Crocket, minors, citizens of the State of Texas, to the bill of complaint of William R. Davie; Mary F. Woolf and her husband, Stephen M. Woolf; John M. Davie and Allen J. Davie, citizens of the State of Texas; Allen J. Davie, citizen of Oregon; Sarah J. Burton and her husband, William S. Burton, *her husband*; Rosa B. McKenzie, widow, Octavia Huggins, widow, Julia Evans, widow, and Thomas W. Davie, citizens of the State of Kentucky.

39 These defendants, now and at all times hereafter saving and reserving to themselves all and all manner of benefit and advantage of exception that can or may be had or taken to the many errors, insufficiencies, and other imperfections in the complainants' said bill of complaint contained, for answer thereto or unto so much thereof as these defendants are advised is material or necessary for them to make answer unto, answering for themselves say that they believe the statements in the said bill of complaint to be true. That they have never received anything whatever, for or on account of the rents, profits, issues or sales of the lands and mines, and that they are entitled to an account therefor, and to a partition of the said lands. That they submit that they should have the right either to confirm any sale or sales of the said lands if made by any person or persons interested therein, and to an account of the proceeds thereof or to a partition of the lands. And these defendants deny all and all manner of unlawful combination and confederacy wherewith they are by the said bill charged, without this, there is any other matter, cause, or thing in the complainants' said bill of complaint contained material or necessary for these defendants to make answer unto, and not herein and hereby well and sufficiently answered, avoided, traversed, or denied is true to the knowledge or belief of *this* these defendants.

All which matters and things these defendants are ready and willing to aver, maintain and prove as this honorable court shall direct.

40 And these defendants pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

FRED. E. FRASER.
M. D. FRASER.
E. G. BURROUGHS.
C. B. JONES.
HENRY B. BULL.
DE SAUSSURE BULL.

Personally appeared before me Frederick E. Fraser, one of the defendants in the foregoing answer named, and made oath that the matter, facts, and things therein stated, as far as they are derived from his own knowledge, are true, and as far as they are derived from the information of others he believes them to be true.

FRED. E. FRASER.

Sworn to before me this 13 day of August, A. D. 1874.

DANIEL HORLBECK,
C. D. C. U. S. for S. C.

41 *Answer of Mary F. Davie.*

THE UNITED STATES OF AMERICA:

Fourth circuit. The western district of North Carolina. In equity.

The answer of Mary F. Davie, widow of the late Frederick William Davie, a citizen of the State of South Carolina, who has been impleaded with B. F. Briggs, John O. Peters, James Sloan, Moses L. Holmes, and Reuben J. Holmes, citizens of the State of North Carolina; Mary F. McCrady and her husband Edward McCrady the younger, Churchill B. Jones, Frederick E. Fraser, Mary D. Fraser, Emily G. Fraser, Isabella S. Fraser, Frederick G. Fraser, Eliza G. Burroughs, De Saussure Bull, Henry B. Bull, Rebecca T. Bull, of the State of South Carolina; William R. D. Crockett and John Jesse Crockett, citizens of the State of Texas, to the bill of complaint of William R. Davie, Mary F. Woolf and her husband Stephen McPherson Woolf, John McKenzie Davie, and Allen J. Davie, citizens of the State of Texas; Allen J. Davie, a citizen of the State of Oregon, Sarah J. Burton and her husband Wilfiam S. Burton, Rosa B. McKenzie, Julia Evans, Octavia Huggins and Thomas W. Davie, citizens of the State of Texas.

This defendant, and at all times hereafter saving and reserving to herself all and all manner of benefit and advantage of exception
42 that can or may be had or taken to the many errors, uncertainties, insufficiencies, and other imperfections in the said complainants' said bill of complaint contained, for answer thereto, or unto so much thereof as this defendant is advised is material or necessary for her to make answer unto, answereth and saith:

1. That she is the widow of the said Frederick William Davie, who died as stated in the said bill of complaint on the 9th of April, 1850, leaving a last will and testament as set forth in the said complaint, the copy of which annexed to the said bill as Exhibit D she believes to be correct, whereby after certain specific bequests the rest and residue of his estate, including his interest in the lands and mines in Guilford County, North Carolina, mentioned in the said bill D, were devised to her, this defendant, his widow, for life, with remainder after her death to the persons mentioned in the said bill.

2. That she recollects the circumstances under which her said husband, Frederick William Davie, executed the deeds to the said Lewis A. Beckham mentioned in the said bill; that the said Frederick William Davie had then for some time been suffering greatly with a painful and distressing disease, that shortly after terminated in his death; that the effects of the said disease were such as to render his conversation most difficult and painful speaking, causing him great agony; that his extreme and constant suffering rendered him for the time in-
43 capable of any calm consideration of his affairs and of recalling what had formerly taken place; that her said husband, though in the habit of the closest confidence in regard to his business with this defendant, was not able to speak to her upon the subject of the said deeds, and this defendant does not believe that he was in a condition to bargain away his property; that it is true that she released her dower thereon, but at the time her mind was engrossed with the care of her husband's health, and she did not concern herself with matters of property.

3. And this defendant, further answering, says that she is informed

and believes that the said deed to the said Lewis A. Beckham, as trustee of M'r's Bedon, purports to have been made upon the consideration of three thousand dollars, paid by the said Hyder A. Davie, father of M'r's Bedon, during his life, to the said Frederick W. Davie; that she believes that the said Hyder A. Davie did pay such a sum to the said Frederick W. Davie for an interest in the said lands and mines, but that upon the payment thereof her said husband executed a conveyance to the said Hyder A. Davie, which is the same as that mentioned by the complainants in their bill, a copy of which they have filed as Exhibit B, and she is confident and alleges that her husband had reference to that interest when he executed the said deed to Louis A. Beckham as trustee, and that he was persuaded that the said
44 deed was necessary to impose upon the said interest the trusts declared in the will of his brother Hyder A. Davie, and only intended to do so, and not to convey another interest in the said lands to the said Lewis A. Beckham as trustee.

That as to the other deed, viz, that to Lewis A. Beckham in his own right, that the said Lewis A. Beckham did not then pay the sum of two thousand dollars, the consideration named in the said deed, nor any other sum whatsoever, nor did he afterwards pay anything to her said husband with her knowledge, nor could he have paid anything without her knowledge, as from that time, the second day of March, 1850, to the ninth day of April following, this defendant was constantly, day and night, with her said husband. That this defendant has been lately informed and believes that the said Lewis A. Beckham, not long after the death of her said husband, sold the interest in the said land he had thus obtained for the large sum of forty-three thousand three hundred and thirty-three $\frac{33}{100}$ dollars, and she submits that the great difference between the consideration mentioned in the said deeds and the sum for which he sold the said interests taken in connection with the condition of her husband's health at the time of the execution of the said deeds, is of itself a reason that the court should closely scrutinize and examine *and examine* the transaction, and she submits
45 that the said deeds, which she believes and charges *taken* fraudulently obtained, should be set aside.

4. And this defendant claims that she is entitled to an account of the rents and profits of the said lands and mines, and of the gold and ores moved and extracted from the said lands and mines, and at her election to an account of any sum or sums of money for which any of the said lands may have been sold.

5. And this defendant, denying any manner of unlawful combination, hopes that the prayer of the said bill of complaint may be granted by this honorable court.

MARY F. DAVIE.

THE UNITED STATES OF AMERICA:

Fourth circuit, western district of North Carolina.

Personally appeared before me Mary F. Davie and made oath that the facts and things contained in her foregoing answer, as far as they are derived from her own knowledge, are correct and true, and as they are derived from the information of others she believes them to be true.

MARY F. DAVIE.

Sworn to before me this 13 day of August, A. D. 1874.

DANIEL HORLBECK,
C. D. C. U. S. for S. C.

46 On the aforesaid rule-day in September, 1874, the defendants, Moses L. Holmes and Reuben J. Holmes, filed the following demurrer:

Demurrer of Holmes & Holmes.

UNITED STATES OF AMERICA:

Western district of North Carolina, fourth circuit. In equity.

The demurrer of Moses L. Holmes and Reuben J. Holmes, two of the defendants to the bill of complaint of William Richardson Davie, Mary Frances Woolf, together with her husband Stephen McPherson Woolf, John McKenzie Davie, Allen Jones Davie, citizens of the State of Texas; Allen Jones Davie, a citizen of the State of Oregon, Sarah Jones Burton, together with her husband William S. Burton, Rosa B. McKenzie, widow, Julia Evans, widow, Octavia Huggins, widow, and Thomas W. Davie, citizens of the State of Kentucky, complainants, as filed against them and others in this honorable court.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things contained in the complainants' bill to be true in such manner and form, as the same are therein set forth and alleged, do demur thereto, and for cause of demurrer show that said complainants or any of them are not seized of the legal estate in the premises or any part thereof, but that the same is outstanding in the heirs at law of the said Cadwallader Jones, who alone are en-
47 titled to demand partition and an account of the rents, issues, and profits of the premises received by these defendants, and to call for an inspection and delivery of the title-deeds, in not being alleged in complainants' said bill that the said heirs at law of said Cadwallader Jones labor under any legal disability to sue in that behalf, nor that they have refused to file their bill or other action against these defendants, or any of the defendants hereto, to compel partition of said premises, and also an account of the rents, issues, and profits thereof received by these defendants, and the delivery of the title-deeds thereto, nor is it alleged in complainants' said bill that the said heirs at law of said Cadwallader Jones are insolvent or otherwise unable to bring suit as aforesaid.

That said complainants have not by their said bill shown such priority of title between them and these defendants, or shown any such right or title as entitled them to the discovery from these defendants thereby sought.

That it appears from the allegations of complainants' bill that the heirs at law of the said Cadwallader Jones are necessary parties to said bill, inasmuch as it is therein stated that the said Frederick William Davie on the 15th day of January, A. D. 1833, in consideration of the premises, executed a deed whereby he conveyed to Cadwallader Jones one undivided third part of the premises, to have and to hold the
48 same to him, the said Cadwallader Jones and his heirs forever, &c.; and it is further therein alleged that the said Cadwallader Jones died on or about the 5th day of February, 1861, intestate as to his legal estate aforesaid in said premises.

Wherefore, and for divers other good causes, these defendants respectively, humbly demand the judgment of this honorable court whether they or either of them shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein con-

tained, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

We certify that in our opinion the foregoing demurrer of Moses L. Holmes and Reuben J. Holmes, defendants, to the bill of complaint of William Richardson Davie & others, complainants, is well founded in law and proper to be filed in the above cause.

J. M. McCORKLE,
W. H. BAILEY,
Solicitors & Counsel for said Defendants.

UNITED STATES OF AMERICA:

Western district of North Carolina, fourth circuit. In equity.

Moses L. Holmes and Reuben J. Holmes being duly sworn, each for himself doth depose and say, that he has read the foregoing demurrer to the bill of complaint in said suit, and that the same is not interposed for the purpose of delaying said suit or any proceedings therein.

M. L. HOLMES.
REUBEN J. HOLMES.

Sworn and subscribed before me the 25th day of August, A. D. 1874.

ROB'T P. DICK,
U. S. Dist. Judge.

At October term, 1874, of the aforesaid court the aforesaid demurrer was overruled and the aforesaid defendants ordered to file an *an* answer on or before the 14th day of January, 1875.

On motion the plaintiffs are required to file a bond for the prosecution of their suit.

Bond filed.

49 At the regular October term, the following order was filed:

THE UNITED STATES OF AMERICA:

Fourth circuit, the western district of North Carolina. In equity.

WILLIAM R. DAVIE ET AL.
vs.
B. F. BRIGGS, JA'S SLOAN, MOSES L. HOLMES, et al.

Motion for a guardian ad litem.—F. G. Fraser appointed.

On motion of Edward McCrady, jun., solicitor, for the infant defendants in this case, it is ordered that Frederick E. Fraser be appointed guardian ad litem of the said infant defendants, to wit, Emily G. Fraser, Isabella S. Fraser, Frederick G. Fraser, Rebecca T. Bull, William R. D. Crockett, and John Jesse Crockett.

HUGH L. BOND,
C't Judge.

Whereupon the cause was continued.

At a special term of the circuit court of the United States of America begun and held on the 14th day of January, 1875, at the court-

house in Greensboro, Rob't P. Dick, judge of the district court of the United States presiding in said court for aforesaid district, the
50 aforesaid named defendants, Moses L. and Reuben J. Holmes, by their counsel, James M. McCorkle and William H. Bailey, filed the following answer to aforesaid bill:

Answer of Holmes & Holmes.

THE UNITED STATES OF AMERICA:

Fourth circuit, the western district of North Carolina. In equity.

The joint and separate answers of Moses L. Holmes and Reuben J. Holmes to the bill of complaint of William Richardson Davie, Mary Fraser Woolf & her husband, Stephen McPherson Woolf, John McKenzie Davie, and Allen Jones Davie, citizens of the State of Texas, Allen Jones Davie, a citizen of Oregon, Sarah Jones Burton with her husband, William S. Burton, Rosa B. McKenzie, Julia Evans, Octavia Huggins, and Thomas W. Davie, against B. F. Briggs, John O. Peters, James Sloan, Moses L. Holmes, Reuben J. Holmes, citizens of the State of North Carolina, The Belmont Mining Company, The McCulloch Copper & Gold Mining Company, Mary F. Davie, Edward McCrady & wife, Mary Fraser McCrady, Churchill B. Jones, Frederick E. Fraser, Mary Davie Fraser, Emily G. Fraser, Isabella S. Fraser, Frederick G. Fraser, Eliza J. Burroughs, De Saussure Bull, Henry B. Bull, and Rebecca T. Bull, of South Carolina, William R. Davie Crockett, and John Jesse Crockett, of Texas.

These defendants, reserving to themselves all manner of exceptions to the many errors, &c., contained in complainants' bill of
51 complaint, for answer thereunto or so much as they are advised is material for them to make answer unto, answering say:

I. They have no knowledge or information upon which they can form a belief as to the allegation contained in first paragraph of complainant's bill of complaint that Allen Jones Davie had discovered that the lands described in said bill of complaint were valuable on account of the deposits of gold, copper, and other valuable ores, and that he induced his brother Frederick William Davie to purchase said lands with a view to mining the same for their joint benefit and advantage, and these defendants say that they are advised and believe that even if these allegations were true, and which these defendants require strict proof thereof, that such understanding or agreement did not create such a contract as can be enforced or regarded as valid in this court, as it is not alleged in complainants' bill of complaint that said understanding was other than verbal.

II. These defendants, further answering, say that they knew nothing about Frederick William Davie ever having owned the lands described in the bill of complaint until about the year 1850, when these defendants were induced to enter into a contract for the working of said lands for minerals.

52 III. That prior to the filing of complanants' bill of complaint these defendants had no knowledge or information upon which they could form a belief that Hyder A. Davie ever had any interest in said lands, nor that Frederick William Davie had ever conveyed by deed to the said Hyder A. Davie one-third part of said lands in fee, nor did they have any knowledge or information upon which they could form a

belief that Frederick William Davie ever conveyed one-third part of the lands mentioned in the II paragraph of complainants' bill of complaint to Cadwallader Jones, in trust, as alleged in said II paragraph, nor have these defendants at this time any knowledge or information upon which they can form a belief that the said Frederick William Davie conveyed the interests in said lands to the said Hyder A. Davie and Cadwallader Jones so as to pass such titles thereto as is alleged in the complainants' bill of complaint, and these defendants require strict proof thereof.

IV. These defendants allege that on the 31st day of November, A. D. 1830, Frederick William Davie, who then owned in fee the tract of land mentioned in complainants' bill of complaint, executed a lease to one Charles McCulloch for the term of twenty years thence next ensuing in and to the said tract of land, in which said lease it was stipulated that the said McCulloch could work such lands for minerals for and during the whole term aforesaid; and that on the first day of January, 1831, the
53 said Frederick William Davie executed a deed in fee-simple to the said Charles McCulloch, whereby he conveyed to the said McCulloch in fee one-third part of all the land mentioned in complainants' bill of complaint; and these defendants further aver that they are informed and believe that Frederick William Davie executed a deed to Louis A. Beckham in trust for Julia Bedou, conveying in fee to the said Beckham one-third part of the lands described in the complainants' bill of complaint, and that said deed was executed on the 2nd day of March, A. D. 1850, and that on the same day the said Frederick William Davie executed another deed to the said Louis A. Beckham, whereby he conveyed to the said Beckham in fee, in his own right, another undivided third part of the lands mentioned in complainants' bill of complaint; and by reason of said deeds executed as aforesaid, all the title which Frederick William Davie formerly had in and to the aforesaid tract of land passed out of him.

V. These defendants, further answering, say on the 9th April, 1850, Louis A. Beckham leased for a term of years two-thirds of the whole tract of land to the defendant, B. F. Briggs, and by the terms of said lease the said defendant, B. F. Briggs, was required to pay one-seventh of the two-thirds of all the gold found to the said Louis A. Beckham; and that thereafter, to wit, on the 12th June, 1850, the said
54 defendant, B. F. Briggs, sublet all the interest which he had in said lease to the defendants, John Peters and M. L. Holmes, and these defendants and John Peters paid the d'f't Briggs nine hundred dollars in consideration for his having transferred his said lease of said land to said defendants; and these defendants paid together John Peters & James Sloan, as toll to the said Louis A. Beckham, one-seventh of two-thirds of all the gold extracted from said land; and that John Gluis worked in partnership with these defendants, who owned one-third of said land, the said Charles McCulloch having theretofore executed a deed in fee-simple to the said John Gluis for one-third part of said lands which he had acquired by deed in fee from Frederick William Davie, executed on the 1st January, 1831.

VI. These defendants, further answering, say that they worked the said mines from about the August, 1850, until the 22 June, 1853; and these defendants utterly deny that they made large profits, or any profits, by reason of the working of said mines; that whilst they were engaged in working said mines, it was not so much with the view of extracting the gold therefrom, as it was to develop and expose to view the veins of gold thereon, and that this was done with the view of

enabling these defendants to sell their interest in said mining property to the greater advantage; and that in pursuing this course these
55 defendants did not make any profits at all in working said mines and extracting the gold therefrom; that the expenses attending the working of said mines, and in the manner hereinbefore stated, was equal to, if not greater than, the value of the receipts from said lands.

VII. These defendants, further answering, say that on the 17th February, A. D. 1852, John G'uis, who was the owner in fee of an undivided one-third part of the tract of land hereinbefore described, executed a deed in fee to the defendants Moses L. Holmes, Reuben J. Holmes, John Peters, and James Sloan for his interest in said lands; and that thereafter, to wit, on the 22nd day of June, 1853, Louis A. Beckham executed a deed to the def't, The Belmont Mining Company, a corporation duly created, for two-thirds of the before-described tract of land, and on the same days these defendants executed a deed to the said defendant, The Belmont Mining Company, whereby they conveyed their undivided interest of one-third part therein to the said defendant; and these defendants say that they, together with the defendants John Peters and James Sloan, jointly received from the def't, The Belmont Mining Company, the sum of eighty-two thousand three hundred and thirty-three dollars and thirty-three cents; and they are informed and believe that Louis A. Beckham received the sum of forty-three thousand six hundred
56 and sixty-six dollars & sixty-six cents from the def't, The Belmont Mining Company.

VIII. These defendants utterly deny that they entered into the possession of the said lands and gold mines thereon as cotenants with Cadwallader Jones, trustee, or his cestuis que trust, or that they worked the same as copartners therein with the said Cadwallader Jones, trustee, or his cestuis que trust, and these defendants aver that at the time they were in the possession of the said lands and gold mines, or when they were working said mines, that they had no knowledge or information which led them to believe that Cadwallader Jones had any interest, either as trustee or otherwise, in and unto said lands, nor did they know that the alleged cestuis que trust of the said Cadwallader Jones had any interest in said lands or mines beneficial or otherwise, nor did they have any information which led them to believe that the alleged cestuis que trust had any interest in said lands and mines, beneficial or otherwise, nor at the time these defendants sold their interest in said lands & mines to the Belmont Mining Company had they any knowledge or information upon which they could form a belief that the said Cadwallader Jones, trustee, or otherwise, or his alleged cestuis que trust, had any interest of any kind in & unto said lands or mines, or
57 that he or they claimed any interest whatever in said lands.

IX. These defendants, further answering, say that they utterly deny that the said Cadwallader Jones ever notified these defendants that he had any interest or right of any kind in and unto said land, either as trustee or in any other capacity, and these defendants are informed, and believe, that it is not true that they or Lewis A. Beckham, or John Peters, or James Sloan, or any of them, at the time of the receipt of the money for which they sold their interest in the said tract of land, entered into an agreement in writing, in which is recited the claim of the said Cadwallader Jones, or that it was recited in any agreement in writing that it was the wish of all the parties to receive their said several shares without prejudice to the legal or equitable claim of Cadwallader Jones, or that whatever claim the said Cadwallader Jones had in & unto the said gold mine, he should have against the said parties who

sold, and received the purchase money instead of the land itself, nor is it true when these defendants or any of the other defendants received and took the purchase money for said lands, that they undertook and agreed to hold or now hold or ever held the proceeds of said sale of the said lands and mines upon any tract whatever.

X. These defendants, further answering, say that Cadwallader
58 Jones was living in 1850, 1851, & 1852, at the time these defendants were engaged in working and developing said mines, and was also living in 1853, when these defendants sold their one-third interest in said lands and mines, and continued to live till some time during the year 1861, when he died, and that he had always been a citizen of North Carolina, and during the period of thirty years prior to his death, did not live more than sixty or seventy miles from the lands and mines hereinbefore described; and these defendants say they are advised and believe that the heirs of the said Cadwallader Jones are necessary parties to this suit before there can be a final determination thereof, and these defendants claim the benefit thereof.

XI. These defendants, for a further defense, answering, say that if they or the other defendants have committed any trespass upon the rights of the complainants who were the cestuis que trust of the said Cadwallader Jones, that the said Jones could have brought an action therefor, and that by reason of no action having been brought heretofore for said alleged causes of action that the same is barred by the statute of limitations in such case made and provided, and these defendants rely on the same as a bar to other action.

XII. For a further defense these defendants say that the causes of action against them did not accrue with three years from the commencement of this action.

59 Wherefore these defendants, having answered all and singular the allegations of complainants which they are advised are material for them to make answer unto, pray to be hence dismissed with their reasonable expenses in this behalf expended.

McCORKLE & BAILEY,
Sol'rs for Defendants M. L. Holmes & R. J. Holmes.

Moses L. Holmes and Reuben J. Holmes, being duly sworn, each for himself declares that the facts set forth in the foregoing answer as of their own knowledge are true, and those matters and things therein stated not of their own knowledge are true to the best of their information and belief.

his
M. L. + HOLMES.
mark.
R. J. HOLMES.

Sworn and subscribed before me this Jan'y the 8th, 1875.
H. B. DUSENBERY,
U. S. Commissioner for the West'n Dist. of N. C.

60 And on the aforesaid 14th day of January, 1875, the following answer of Frederick G. Fraser, guardian ad litem:

Answer of F. G. Fraser, guar. ad litem.

THE UNITED STATES OF AMERICA:

Fourth circuit. The western district of North Carolina. In equity.

These defendants, Emily G. Fraser, Isabella S. Fraser, Frederick G.

Fraser, Rebecca T. Bull, William R. Davie Crockett, and John Jesse Crockett, minors, answering the bill of complaint of William R. Davie, and others, by their guardian ad litem, Frederick G. Fraser, answering, say that they are infants of tender years and knew nothing of the matters, facts, and things stated in the complainants' bill of complaint and submit their rights therein to the protection of this honorable court.

FRED. E. FRASER.

EDWARD MCCRADY, jun.,
Solicitor for F. G. Fraser, Guardian ad litem.

61 On rule day in February, 1875, the following order was filed:

Order to amend bill. Amended.

THE UNITED STATES OF AMERICA:

Fourth circuit, western district of North Carolina. In equity.

WILLIAM R. DAVIE ET AL.
vs.
MOSES L. HOLMES ET AL. } Order.

On motion of complainants' solicitors, it is ordered that the bill in this case be amended by adding Allen C. Jones, a citizen of the State of Alabama; Cadwallader Jones, a citizen of the State of South Carolina, Pride Jones, Mary Ruffin, wife of Peter B. Ruffin, Sally R. Collins, citizens of the State of North Carolina, and Mary P. Jones, Rebecca Jones, Sarah Jones, Robin Jones, and Lucy C. Jones, infant children of the late Robin ap C. Jones, citizens of the State of Tennessee, heirs at law of the late Cadwallader Jones of North Carolina, as parties thereto, and that they do appear, plead, demur, or answer to the complainants' bill on or before the first Monday of March next, and that Mrs. Sarah P. Jones be, and is hereby, appointed to serve this order upon the said infant defendants, children of the late Robin ap C. Jones.

62 On the aforesaid rule day in February, 1875, the following order was filed:

Order of publication. Pub. made.

THE UNITED STATES OF AMERICA:

Fourth circuit, western district of North Carolina. In equity.

WILLIAM R. DAVIE ET AL.
vs.
MOSES L. HOLMES ET AL. } Order.

The defendants "The Belmont Mining Company" and "The McCulloch Copper an' Gold Mining Company" not being found within this district, and not having voluntarily appeared in this suit, it is ordered that the said absent defendants do appear, plead, answer, or demur to the complainants' bill on or before the first Monday of March next; and that publication be made of this order in The New North State, published at Greensboro', North Carolina, once a week for three successive weeks.

Witness:

JNO. W. PAYNE, *Clerk, &c.*

Judgment pro confesso against the aforesaid missing co's.

And at April term, 1875, it was adjudged that due publication had been made for the defendants, the aforesaid gold mining companies.

Whereupon, upon motion of the plaintiffs' attorney, judgment
62½ pro confesso is entered against the aforesaid defendants.

63 And at rule day in February, 1875, the following order for commissions was filed:

Order for commissions, &c., to take depositions.

In the United States court, fourth circuit, western district of North Carolina. In equity.

WILLIAM R. DAVIE ET AL.
vs.
MOSES L. HOLMES, REUBEN J. HOLMES, ET AL. } Order.

It appearing from the answer of the defendant' Moses L. Holmes and Reuben J. Holmes, in this cause, that the defendant B. F. Briggs had parted with his interest in the subject-matter of this suit prior to the commencement of these proceedings, and by assignment had rested the *the the* entire title he had thereto to the defendants John Peters, Moses L. Holmes, Reuben J. Holmes, and James Sloan, it is ordered that the bill be dismissed as to the said defendant B. F. Briggs.

It being alleged in the complainants' bill that the defendant John Peters has departed this life, and that his estate is insolvent, and the said allegation not being denied in the answer of the said defendants Moses L. Holmes and Reuben J. Holmes, it is ordered that the bill be dismissed as to the said defendant John Peters.

64 The defendant James Sloan having been duly served and not having filed plea, demurrer, or answer to the bill in this case, it is ordered that the bill be taken pro confesso against the said defendant James Sloan.

On motion of plaintiffs, by their attornies, it is ordered by the court that they have leave to add general replication to the answer filed, & that on the application of either or any party a commission issue for taking depositions or proofs in the cause according to 67th rule prescribed for courts of equity of the United States, & in issuing said commission, it is ordered by the court that the clerk of the court be vested with the power to name the commissioner or commissioners to take the depositions.

DICK, *Judge.*

On the third day of March, 1875, the following order, appointing the clerk a master in chancery to take depositions in this cause, was filed:

Order of appointment of master in chancery.

THE UNITED STATES OF AMERICA:

Fourth circuit, western district of North Carolina. In equity.

WILLIAM RICHARDSON DAVIE, MARY FRASER Woolf, together with her husband, Stephen McPherson Woolf, John McKenzie Davie, and Allen Jones Davie, citizens of the State of Texas; Allen Jones Davie, a citizen of the State of Oregon; Sarah Jones Burton, together with her husband, William S. Burton; Rosa B. McKenzie, widow; Julia Evans, widow; Octavia Huggins, widow; and Thomas W. Davie, citizens of the State of Kentucky,

vs.

B. F. BRIGGS, JOHN O. PETERS, JAMES SLOAN, Moses L. Holmes, and Reuben J. Holmes, citizens of the State of North Carolina; Mary F. Davie, widow of Frederick William Davie; Mary Fraser McCrady and her husband, Edward McCrady, the younger; Churchill B. Jones, Frederick E. Fraser; Mary Davie Fraser, Emily G. Fraser, minor; Isabella S. Fraser, minor; Frederick G. Fraser, minor; Eliza Burroughs, widow; De Saussure Bull, Henry B. Bull, Rebecca T. Bull, minor, citizens of the State of South Carolina, and William R. Davie Crockett, minor, and John Jesse Crockett, minor, citizens of the State of Texas.

Appointment of J. W. Payne as master & examiner.

It is ordered that John W. Payne, esqr., be & is hereby appointed a master in chancery in this cause and examiner for the same, with all the powers of masters & examiners under the rules of this court and of the Supreme Court of the United States made to regulate the practice in the courts of equity of the United States.

ROB'T P. DICK,
U. S. Dis't Judge.
HUGH L. BOND,
C't Judge.

66 *Clerk to be master in chancery.*

UNITED STATES OF AMERICA:

4th circuit, western district of North Carolina. In equity.

DAVIE AND OTHERS
against
B. F. BRIGGS & OTHERS.

The undersigned, respectively counsel for complainants & defendants, consent that the clerk of the circuit court at Greensboro', may, to-day,

pass upon the depositions heretofore taken in the above-entitled cause, and taken by complainants, and so from time to time when other depositions are taken.

March 10th, 1875.

McCORKLE & BAILEY,
Sol'rs for Def'ts M. L. Holmes & R. Holmes.
DILLARD & GILMER,
Sol'rs for Complainants.

Notice having heretofore been issued according to order heretofore made in this cause, the examiner, John W. Payne, recorded the following testimony on the 16th, 17th, 18th, 19th, 20th of March, 1875, which he filed in the said cause on the 20th of March, 1875, both plaintiffs and defendants having due notice served on them.

67 In the circuit court of the United States for western district of North Carolina, at Greensboro', in said district.

WILLIAM R. DAVIE ET AL.
against
B. F. BRIGGS ET AL.
} In equity.

Deposition of C. P. Mendenhall, witness.

In pursuance of a notice heretofore given in this case and hereto appended, I proceeded, on this 16th day of March, 1875, at my office in Greensboro', to open the taking of the depositions of the witnesses named in said notice.

Present, J. A. Gilmer, of Dillard & Gilmer, counsel for pl'ffs.

CYRUS P. MENDENHALL, a witness on the behalf of the plaintiffs, being introduced, deposes and says as follows:

Question. State your age, residence, & occupation.

Answer. I am 58 years old; reside in Greensboro', N. C.; and am a practicing lawyer.

Question. When did you come to Greensboro'?

Answer. I came to Greensboro' in 1841; was born and raised in Jamestown, & resided there until I moved to Greensboro'.

Question. State whether you were acquainted with Allen Jones Davie. If so, when, where, and during what period?

Answer. I knew him and his family well about the years 1831, '32, & '33. They lived in and near Jamestown, in Guilford County, some
68 or three years. After that time he moved, with his family, to Hillsboro', N. C. I frequently saw him and members of his family, after they left Jamestown.

Question. State whether you are acquainted with the mining property in Guilford County known as the McCulloch mine, formerly owned by the Teagues, and afterwards sold to F. W. Davie, & afterwards owned & worked by the Belmont Mining Company and the McCullock Mining Company. State fully your knowledge of said property.

Answer. I knew the property when it was first worked as a mine. It belonged to the Teagues. Philip Horney afterwards leased or made a contract to work it for gold. From that time it was called the Horney Mine. Though not present at the contracting, I am well aware that it was a matter of notoriety in the neighborhood of Jamestown that, at the instance of Allen Jones Davie, who was given to speculation and adven-

ture, this property was afterward sold to his brother, William Davie. Allen Jones Davie lived on the land after this purchase, & worked the mine for a short time, when he got into a law-suit with a man by the name of McCulloch, who also had an interest in the mine and worked it. This litigation extended through a considerable period of time, and was a matter of general notoriety in the neighborhood of Jamestown.

Question. Did you know the firm of Peters, Sloan & Company? If so, who composed said firm, and when and what connection did they have with this property?

69

Answer. I knew the firm. It was composed of John Peters, James Sloan, and Moses L. Holmes. They were engaged in mining. I think they purchased the property about the year 1853. I knew they took possession of it, and, as I afterwards learned, they sold it to the Belmont Mining Company, who took possession of the said property to my knowledge.

Here the further taking of these depositions is adjourned over until to-morrow morning at 10 a. m., at the same place.

Pursuant to adjournment, the further examination of Cyrus P. Mendenhall was continued at the same place, on the 17th day of March, 1875.

Question. State in what year did Peters, Sloan & Co. sell the property to the Belmont Company, and for what price did they sell.

Answer. The sale was in 1853. I do not know of my own knowledge what they got each, but the general rumor and understanding was that they got $35,000.00 each, to wit, James Sloan, John Peters, & Moses L. Holmes, and Reuben Holmes, who came in as a partner with Moses L. Holmes.

Question. At the time of this sale, state whether or not there was anything said in reference to a claim in behalf of Allen Jones Davie & his family in said lands or its proceeds; &, if so, what was said.

70

Answer. I know nothing as heard between the parties to the trade directly, but I know that there was a general and notorious fact that Allen Jones Davie and his family had a third interest in said property.

Question. State, if you know, how much of the proceeds of the sale to the Belmont Company John Peters got, and your means of knowing it, &c.

Answer. Peters died a few years after that, & I administered on his estate; from that fact I became convinced of the fact that said Peters received upwards of twenty thousand dollars from that sale. I closed up the estate several years ago, and the only child is insolvent.

Question. State whether or not at or about the conclusion of the sale to the Belmont Company a man by the name of Lewis A. Beckham was present in Greensboro' giving attention to the sale or claiming any interest therein.

Answer. I remember there was a gentleman here about 1853, at the time of the sale to the Belmont Mining Company of said property, representing the interest of some parties who were not residents of this section of country. I do not remember the name of this gentleman.

Question. Who made the trade with the Belmont Company on the part of the vendors and vendees, and how was it negotiated or effected?

71

Answer. My understanding was that Peters and Moses Holmes were working that mine with one Gluyas, and whilst they were working said mine, Samuel Smith and John L. Colby came out here from the North, hunting for mining property, and James Sloan negotiated with them as the representatives of the Belmont Company

and in the course of the negotiation Peters, Sloan *Sloan* & Holmes bought out Gluyas, and in the sale to the Belmont Company they conveyed that interest to said company, represented by Smith & Colby, as aforesaid. And further this deponent saith not.

CYRUS P. MENDENHALL.

Sworn & subscribed before me March 17th, 1875.

JNO. W. PAYNE, *Examiner.*

Deposition of J. A. Gilmer.

Next came JOHN A. GILMER, who, being first duly sworn, deposeth & saith:

Question. Please state what is your age, your business, & what the relationship between yourself and the late John A. Gilmer, of Greensboro'.

Answer. I am 36 years of age; am a practicing lawyer, & am a son of the late John A. Gilmer.

By same. State who was counsel to Peters, Sloan & Co., a mining firm of Guilford County, & how it is that you are possessed of any information on this subject.

Ans. The only knowledge of that matter I have is, that as executor of said John A. Gilmer, his papers & letters came into my possession, & among them I found a package of papers containing allusions to
72 the matters of Peters, Sloan & Co., & certain deeds & memoranda pertaining to their business. I know the fact that my father was the counsel and confidential friend of M'r James Sloan in his mining operations.

By same. Will you please describe the package alluded to above, its superscription, the deeds and other papers therein, and make the same a part of your deposition?

Answer. The package alluded to was found in a box used by my father as a place for keeping his letters, &c., pertaining to mining matters. The package was enveloped in an ordinary yellow envelope, which I now produce, marked "A," addressed "James Sloan, esqr., Greensboro', N. C," & on the same having the words endorsed, "Deeds Belmont McCulloch," & contained the following papers:

1st. A notice from "Ralph Gorrell, sol'r for C. Jones & the heirs of A. J. Davie, dec'd." to "Mess'rs Peters, Sloan & Co.," dated July 23d, 1853, marked "B," which I also file.

2nd. A deed of lease from L. A. Beckham to B. F. Briggs, dated 9th April, 1850, registered in book G No. 2, page 647, of the register's office of Guilford County, at the foot of which there is an assignment of the lease by B. F. Briggs to John Peters & M. L. Holmes, marked "C," & herewith also filed.

3rd. A deed from M. L. Holmes to Reuben J. Holmes, for an interest in certain land purchased of John Gluyas, which I herewith produce, marked "D."

73 4th. A deed apparently prepared for signature, but not signed (prepared for Lewis A. Beckham), which I also produce, marked "E." Besides some other papers, which, although relating to the same property & the same matters, do not appear material to the matters in controversy here, but which I will cheerfully produce if required.

And further this deponent saith not.

J. A. GILMER.

Sworn & subscribed before me March 17th, 1875.

JNO. W. PAYNE,
Examiner.

Next comes WILLIAM U. STEINER, who, being duly sworn, deposeth & saith:

Question. Please state whether you are public register of Guilford County, & as such what records, &c., you have & keep in your custody.

Answer. I am public register of deeds for the county of Guilford, & I have in possession and my keeping the deed-books of all deeds ever registered in the said county; to now register all deeds probated & ordered to be registered, and when applied for to give certified copies of all deeds heretofore registered.

Question. Please state if there is a deed on record in your office from Fred. W. Davie to Charles McCulloch, dated 1st day of January, 1831; & if so, will you please give a copy of the same.

74 Answer. There is such a deed in my office on record-book N, 1833, page 48. I have copied & certified the same and herewith file it, marked "I," as part of my deposition.

By same. Is there a deed on record in your office from Cha's McCulloch to John Gluyas, and also a deed from John Gluyas to John Peters, James Sloan, & Moses L. Holmes? If so, state in what books recorded, & give copies thereof.

Answer. There is a deed from Charles McCulloch to John Gluyas on record in my office in book E. No. 2, page 651, & a copy thereof I herewith file marked "No. II." There is also on record in my office a deed from John Gluyas to John Peters, James Sloan, and Moses L. Holmes, book G, No. 2, page 638; a copy thereof I herewith file as a part of my evidence.

By same. Please state if the deed from Moses L. Holmes to Reuben J. Holmes, made an exhibit of in John A. Gilmer's deposition, is also on record in your office, & is not said exhibit the original deed so recorded?

Answer. I have seen the Exhibit C made by J. A. Gilmer, and the same is on record in my office, and the said exhibit is the original deed now on record in my office.

By same. Is there any deed on record from James Sloan, John Peters, Moses L. Holmes, & Reuben J. Holmes to the Belmont Mining

75 Company; &, if so, will you make a copy & file the same as a part of your deposition?

Answer. There is such a deed on record, and I herewith file a copy thereof marked "No. 4."

By same. Is there a deed on record in your office from Lewis A. Beckham to the Belmont Mining Company; if so, will you make & file a copy thereof as a part of your deposition?

Answer. There is such a deed on record, and I herewith file a copy thereof marked "No. 5."

By same. Is there a deed on record in your office from F. W. Davie to Hyder A. Davie? If so, please make a copy & file it as part of your deposition.

Answer. There is such a deed on record in my office, and I herewith file a copy certified by my p'edecessor, marked "No. 6," and the same is a true copy.

By same. Is there a deed on record in your office from F. W. Davie to L. A. Beckham? If so, make a copy & file the same as part of your deposition.

Answer. There is such a deed on record-book G, No. 2, page 642. I herewith file a copy of the same as a part of my deposition, marked "No. 7."

By same. Is there not also a deed from F. W. Davie to Lewis A. Beckham, trustee for M'r's Bedon, on record in your office? If so, make & file a copy thereof as part of your deposition.

Answer. There is such a deed on record, and I file a copy
76 thereof, recorded book G No. 2, page 644, marked "8."

And further this deponent saith not.

WILL. U. STEINER.

Sworn & subscribed before me March 17th, 1875.

JNO. W. PAYNE,
Examiner.

Deposition of J. N. Nelson.

Next came J. N. NELSON, who, being duly sworn, deposeth and saith:

Question. Are you the clerk of the superior court of Guilford County, and are you the custodian of the records of the late court of equity of said county?

Answer. I am, and as such have the possession of the records of said court.

Question. Please state whether you find on the trial-docket of said court of equity any mention of the existence of a suit in the said court of equity wherein Allen J. Davie et al. were pl'ffs, and Charles McCulloch et al. were defendants. If so, state when it came on the docket, how long did it remain on the docket, and what finally went with the suit.

Answer. I here produce to the examiner the trial and minute dockets of the late court of equity of Guilford County, and therefrom it appears that the said suit came into court fall term, 1833, and was regularly continued from term to term of said court until spring term, 1838,
77 when it was transferred to the supreme court for trial, and afterwards on the coming down of a certificate from the supreme court, to wit, at the spring term, 1841, of the superior court, the said suit was dismissed at the costs of the complainants, as appears by the entry on the records.

Question. Please state if the original papers are on file in your office.

Answer. I have caused the same to be looked for by my deputy who was my predecessor, and they cannot be found.

Question. Are there entries on the record from term to term, from the beginning of said suit in 1833 until spring term 1841? If so, will you file a transcript of the same?

Answer. There are such entries, and I will file a correct copy of the same, and herewith file the same, marked "H."

And further this deponent saith not.

J. N. NELSON.

Sworn & subscribed before me March 17th, 1875.

JNO. W. PAYNE,
Examiner.

Whereupon the further taking of these depositions is adjourned until to-morrow morning at 10 a. m. at the same place.

78 *Deposition of Jesse H. Lindsay.*

THURSDAY, 18*th of March*, 1875.

The further taking of depositions is resumed this day at the place

specified in the notice & in pursuance of the adjournment on yesterday.

First comes JESSE LINDSAY, who, being first duly sworn, deposeth & saith as follows:

Question by plaintiff. Please state whether the Bank of Cape Fear had a branch at Greensboro' during the year 1853 & before & after that year, &, if so, who was the cashier?

Answer. The Bank of Cape Fear had a branch bank at Greensboro' during the year 1853, both before and after, and I was the cashier.

By same. In whose custody and possession are the books & papers of said branch bank, showing the dealings between the bank & the customers during the years 1853 & 1854?

Answer. They are in my possession.

By same. Please state if a firm by the name of Peters, Sloan & Co. were a customer of said branch in said years, & state, if you know, who were the members of the firm.

Answer. The firm of Peters, Sloan & Company were customers of the said bank during the years 1853 & 1854. John Peters and James Sloan were members of the firm, and I always understood that Moses L. Holmes and Reuben Holmes were members also.

79 By same. In what business or property were they *they* engaged as partners, if you know?

Answer. They were engaged in mining at what is known as the McCulloch mine.

By same. Please state what this firm did with the mine you refer to & at what price they sold it; to whom, & who negotiated the sale on the part of the firm.

Answer. I know they sold the mine for about $135,000.00; to whom they sold I do not know. Franklin Osgood made the payments. I do not know who negotiated the trade, but John A. Gilmer, now dead, acted as the attorney for the parties.

By same. State, if you know, through what bank, if any, did Peters, Sloan & Co. transact the collecting & disbursing of the proceeds of the sale of said mine, & if through your bank, how much was received on account of said sale of the mine during 1853 & 1854, & how much was paid out during the same years.

Answer. The collecting and disbursing of the proceeds of the sale of the mine was done through the Bank of Cape Fear at Greensboro,' and the whole of the account I herewith produce, marked "A," and file as a part of my deposition, shows $141,681.90 placed to the credit of the firm, and of this it was all the proceeds of the mine sale except $4,041.50,

80 and opposite thereto on the same account the whole amount was disbursed as indicated on the said account. The amount credited to the firm came in at four different times or more, as indicated in said account, the principal items of which were $50,000.00, $28,333.33 at three different times, and the residue of the items were interest and premiums on said amount.

By same. On whose checks was this money paid out & disbursed & to whom?

Answer. On Peters, Sloan & Co.'s checks, and it was paid to the persons indicated in the account heretofore filed by me as a part of my deposition; where the names are written in full and where they are put down by initials it will be understood thus, to wit: J. P. for John Peters; L. A. B. for Lewis A. Beckham; M. L. & R. J. H. for Moses L. and Reuben J. Holmes; J. P. for John Peters, for Holmes; James Sloan for B. & B., for Beckham and Bedon; H. & H. for Holmes &

Holmes, and J. A. G. for John A. Gilmer. And further this deponent saith not.

JESSE H. LINDSAY.

Sworn & subscribed before me March 18th, 1875.

JNO. W. PAYNE,
Examiner.

Next comes ABEL GARDNER, who, being duly sworn, deposeth as follows:

81 By plaintiff. Who purchased the property of one Teague known as the McCulloch mine, if you know?

Answer. It has been a long time ago, but I think that Teague had leased it to Phillip Horney, and A. J. Davie purchased or contracted for the property. I suppose it was A. J. Davie, because he lived on the land and exercised ownership.

By same. Did A. J. Davie ever work the mines, and how long did he live on the land?

Answer. I think he worked it whilst he lived there; I think he lived there some two or three years.

By same. State if you know whether Peters, Sloan & Co. ever possessed & worked the mines & whether they sold & to whom & for what price.

Answer. I know that Peters, Sloan & Co. owned and worked the McCulloch mine for a time; they sold it, but I do not know to whom. It was generally understood in the neighborhood that they received some $125,000.00 or $130,000.00.

And further this deponent saith not.

ABEL GARDNER.

Sworn and subscribed before me March 18th, 1875.

JNO. W. PAYNE,
Examiner.

Whereupon the further taking of these depositions is adjourned until to-morrow at 10 a. m. at same place.

82 MARCH 19TH, 1875.

The further taking of depositions is adjourned over to the same place to to-morrow, the 20th March.

Deposition of S. G. Coffin.

MARCH 20TH, 1875.

The taking of depositions in this case is resumed to-day, the 20th March, 1875, pursuant to adjournment.

S. G. COFFIN, being first duly sworn, deposeth & saith:

Question by plaintiffs. State if you know Allen Jones Davie, & what were your opportunities to know him.

Answer. I knew Allen Jones Davie. He lived in my neighborhood; practiced medicine in his family, and knew him well.

Question. Did you know the mine purchased by the Davies of one Teague? &, if so, state who purchased the property, & in whom was the title taken.

Answer. I knew the property purchased by Allen J. Davie. I always understood that Allen Jones Davie purchased said property

from a man named Teague, and not being able to pay for it, his brother, F. W. Davie, paid for it, and took the title in his own name, and then afterwards he conveyed a third to his brother, Hyder Davie, and another third to Cadwallader Jones, in trust for Allen Jones Davie and his family.

By same. What acts of ownership, if any, did Allen Jones Davie exercise over the said property after it was bought?

83 Answer. My notion is that he did not live on the property, but near to it, and that the Davies worked the mine previous to the sale to Charles McCulloch, and after McCulloch bought an interest he raised a large quantity of ore, and went to Charleston and got him an engine and erected it on another peice of land near by, and thereafter a trouble (the witness does not know what) grew up, & a suit was brought by Allen J. Davie against Charles McCulloch et al., which was pending in the courts a long time. After this McCulloch left the property and went to Columbia, S. C., and Allen J. Davie moved to Hillsboro', N. C., and then he moved to South Carolina, and then started to California, and has not been heard of since.

By same. Who went into the possession and use of the property after Allen Jones Davie & McCulloch broke up & left it, as stated above?

Answer. After they left, the property seemed to be controlled by Jonathan Worth, and after a while Peters, Sloan & Co. leased it, and worked it for a while, and then sold it to a northern company, and received a large sum of money, as the witness understood.

By same. Of whom did Peters, Sloan & Co. lease the property, & was it of the whole or a part only?

Answer. They leased it of a man by the name of Beckham,

84 and their lease was of a two-thirds interest only.

By same. Who composed the firm of Peters, Sloan & Co.?

Answer. John Peters, James Sloan, Moses L. Holmes, & Reuben Holmes.

By same. Please state what the common reputation was & has been as to any interest in said property by or for A. J. Davie or his family or both.

Answer. It was notorious in the neighborhood that Allen Jones Davie and his family had an interest in this property, and that the same was held by Cad. Jones for their benefit.

And further this deponent saith not.

S. G. COFFIN.

Subscribed & sworn before me March 20th, 1875.

JNO. W. PAYNE,
Examiner.

The following is a copy of Exhibit A, spoken of in the deposition of John A. Gilmer:

Exhibit A, spoken of by J. A. Gilmer.

Deeds. Be'mont. James Sloan, esq. McCullock. Greensboro', N. C.

85 The following is a copy of Exhibit B, as spoken of by Jno. A. Gilmer in his deposition.

Exhibit B, spoken of by J. A. Gilmer.

Mess'rs PETERS, SLOAN & CO.:

GENTLEMEN: You are hereby notified that one third of the purchase-money for which the McCulloch mine, in the county of Guilford, has lately been sold, is claimed by Col. Cadwallader Jones, as trustee, for the use and benefit of the children & heirs-at-law of Allen J. Davie, by a deed from F. W. Davie, bearing date the 15th day of January, 1833. You are therefore requested & notified to retain one-third of said money in your hands, for the use of said heirs, and not to pay out the said third to any person or persons without the consent of Col. C. Jones.

July 23, 1853.

Respectfully yours,

RALPH GORRELL,
Sol'r of C. Jones & the heirs of A. J. Davie, dec'd.

The following is a copy of Exhibit C, as spoken of by John A. Gilmer in his deposition:

86 *Exhibit C, spoken of by J. A. Gilmer. Agreement between Beckham & Briggs.*

STATE OF SOUTH CAROLINA:

Memorandum of an agreement made & concluded upon by and between Lewis A. Beckham, of the district of Chester & State aforesaid, on the one part, and B. F. Briggs, of the State of North Carolina & county of Gaston, on the other part, viz:

The said L. A. Beckham, for and in consideration of a certain share of gold hereinafter specified, have agreed to let & lease, & by these presents do let & lease, unto the said B. F. Briggs, an undivided two-thirds part of a tract of land containing two hundred acres, more or less, lying in Guilford County, State of N. Carolina, on the waters of Deep River, which said tract of land contains a gold mine, & was granted to Teague, & by his agent conveyed to F. W. Davie in 1828, & is bounded on the north by lands of David Lindsay, & more particularly in the said conveyance to F. W. Davie, together with all and singular the wood, timber, & all such appurtenances thereunto belonging as may be necessary for working any part of said tract of land as a gold mine, for the term of five years, commencing on the 4th day of April, 1850, and ending on the like day of April, 1855, and in case the said B. F. Briggs shall put up a steam-engine upon said premises, then the
87 term of this lease to be extended to the fourth day of April, A. D. 1858.

It is further understood upon that, at the expiration of this lease, the said B. F. Briggs is to be entitled to hold & remove all machinery, engine, & improvements whatever made or erected by him for the working of said gold mine. The said B. F. Briggs, in consideration of the above letter and leased gold mine & premises, doth covenant, promise, & agree to pay unto the said L. A. Beckham one-seventh of two-thirds of all the gold made & obtained from said mine (to be paid quarterly if required); and farther, should the said B. F. Briggs cease to work said mine for six months at any time during the term of this lease, then, and in that event, he forfeits all his right to a continuance of this lease. The said B. F. Briggs further promises well & truly to keep and use said gold mine in a workmanlike manner, and as the intention of

this agreement directs, & at the expiration of the term for which said mine & premises are hereby leased, to surrender and deliver up the said mine & premises to the said L. A. Beckham, or his legal representative, in good order and condition, unavoidable accidents excepted.

In testimony whereof the said parties to these presents have hereunto set their hands & seals this ninth day of April, 1850.

L. A. BECKHAM. [L. S.]
B. F. BRIGGS. [L. S.]

Signed & seal'd in the presence of—
JOHN S. MOORE.
H. L. KILLIAN.

88 Know all men by these presents, that I, B. F. Briggs, in consideration of nine hundred dollars, have bargained, sold, assigned, and set over, and by these presents do bargain, sell, assign, and set over, to John Peters and M. L. Holmes, of Rowan County, in N. Carolina, all the terms and interest in the within premises yet remaining by virtue of the said indenture, and likewise all my interest, claims, property, and demands of, in, and to the said lands, tenements, and premises which I here have by means of the within indenture, subject to the conditions and covenants in the said indenture contained.

In testimony I have hereunto set my hand and seal this the 12th day of June, A. D. 1850.

B. F. BRIGGS. [L. S.]

S. P. ALMANADE.
JOHN T. HEARN.

SOUTH CAROLINA,
York District:

Personally appeared before me, Edward Moore, one of the magistrates for the district aforesaid, John S. Moore, who, being duly sworn, says that he was present &saw L. A. Beckham & B. F. Briggs sign & seal, & heard them acknowledge the instrument of writing first above written for the uses & purposes therein expressed, and that he, together with H. L. Killian, subscribed their names as witnesses thereto, and he further states that he & said H. L. Killian both reside in York District, South Carolina.

Sworn & subscribed before me October 23rd, 1850.

J. S. MOORE.

E. MOORE, *Mag't.*

89 SOUTH CAROLINA,
York District:

I, John G. Enloe, clerk of the court of common pleas & general sessions for York District, hereby certify that E. Moore, esq., whose name appears to the foregoing affidavit, is, & was at the time of his signing the same, an acting magistrate for said district; that the signature purporting to be his is genuine, and that full faith & credit are due & ought to be given to his official acts.

Witness my hand & the seal of my office, at office at Yorkville, the 23rd day of October, 1850.

[SEAL.]

JOHN G. ENLOE,
C. C. C. Pl's & G. S.

February term, 1852.

STATE OF NORTH CAROLINA,
Guilford County:

The foregoing lease was proved in open court and upon inspection—
It was ordered that the same be registered with the certificates attached thereto.
Test:

JOHN M. LOGAN, *C. C. C.*

The within lease & the certificates thereon was duly registered in the register's office in book G, No. 2, page 647-'48-'49-'50.

ROBERT T. WOODBURN, *P. R. C.*

90 The following is a copy of Exhibit D, as spoken of by Jno. A. Gilmer in his deposition:

Exhibit D, spoken of by J. A. Gilmer Deed from M. L. to R. J. Holmes.

This indenture, made on this the 15th day of January, A. D. 1853, between Moses L. Holmes, of the county of Rowan, in the State of North Carolina, of the one part, and Reuben J. Holmes, of the said county and State, of the second part, witnesseth:

That whereas the ex parte and property herein conveyed hath heretofore been purchased and paid for out of the joint funds of the parties hereto, but the title taken to & in the name of Moses L. Holmes, whereas the same, since the acquisition of the titles aforesaid to said Moses L. Holmes, hath been worked on the joint account of the said parties, each alike to participate in the profits and losses, & whereas it is the purpose of this deed to convey to Reuben J. Holmes his part, & give therein the proper explanations, therefore, for and in consideration of the premises, & for and in consideration of the sum of ten dollars to him in hand paid, the receipt of which is hereby acknowledged, he, the said Moses L. Holmes, doth bargains, sell, alien, transfer, and convey, and by these presents hath bargained, sold, aliened, transferred, and conveyed, unto the said Reuben J. Holmes & his heirs, one-sixth of the tract of the land, mills, and machinery in Guilford County, on Deep River, purchased from Haley Dempsey and John S.
91 Brown, being one-half of the interest in said tract of land held in the name of said Moses L. Holmes, said land being bounded as follows, to wit: Beginning at a stone on the north side of Deep River, running west thirty poles to a stone near a forked walnut tree by the side of a branch; thence south thirty-four poles, crossing the mill-pond, to a stone; thence east thirty poles, to a stone; thence north thirty-four poles, to the beginning, containing six acres and sixty poles, be the same more or less.

Also one eighteenth of the tract of land in said county of Guilford, purchased of John Gluyas, and sixth of a lease taken by Moses L. Holmes & John Peters in two-thirds of said tract (see lease) from Briggs, who leased, bounded as follows: Beginning at a stone, the original corner of the Dunning tract, running south with Hamilton's old line one hundred & fifty-one poles to a stone, Gluyas' own corner; thence west with the old line two hundred poles to a small post oak, Gluyas' corner; thence north one hundred and fifty-three poles to a stone, Gluyas' corner; thence south 88° east, with a marked conditional line two hundred poles to the

beginning, containing one hundred and ninety acres, more or less, being on the waters of Deep River, known as the McCulloch mine
92 tract; also one-sixth of all the improvements and mining property owned and used by the mining company, operating on said lands under the name and style of Peters, Sloan & Co., see former deed and leases registered in Guilford County & articles of agreement & partnership between said company, for more certainty; together with all improvements and appurtenances to said lands belonging, or in any wise appertaining, to have and to hold to the own proper use and benefit of him the said Reuben J. Holmes, his heirs and assigns forever.

And the said Moses L. Holmes, for himself & his heirs, doth covenant and agree to & with the said Reuben J. Holmes and his heirs, that he will forever warrant and defend the title to the property and estate hereby conveyed against the lawful titles and claims of any and all persons holding or in any way claiming under, by, or through him.

In testimony whereof the said Moses L. Holmes hath hereto set his hand & seal.

M. L. HOLMES. [SEAL.]

Signed, sealed, and delivered in the presence of—
JAMES SLOAN (jurat).
HENRY OLIVER.

Feb'y term, 1853.

STATE OF NORTH CAROLINA,
Guilford County:

The execution of the foregoing deed was proven in open court by James Sloan, one of the witnesses thereto.

Ordered to be registered.

Test:

JOHN M. LOGAN, *Clerk*,
By B. G. GRAHAM, *D. C.*

The within deed & the certificate thereon was duly registered in the register's office, in book I, No. 2, pages 165, '66, '67.

ROBERT T. WOODBURN, *P. R.*

93 *Deed of Beckham to Belmont Co.*

Whereas heretofore, L. A. Beckham made a deed as follows, to wit:

Whereas, John Peters, James Sloan, Mary L. Holmes, and Reuben J. Holmes are interested in the McCulloch Gold Mining tract in Guilford County, on Deep River, in this deed described as follows, to wit: the owners of one undivided third part, in fee-simple, and as lessees of L. A. Beckham, of Chester District, South Carolina, of the other two-thirds up to the 4th day of April, A. D. 1858, paying to the said Beckham, by way of rent, one-seventh of two-thirds of all the gold made and obtained from said mine;

Whereas the said Lewis A. Beckham, in his own right, and as trustee for M'r's Julia Bedon, wife of R. S. Bedon, and her children, is the owner of the remaining interest and estate in said land in fee-simple;

And whereas the said John Peters, James Sloan, Moses L. Holmes, Reuben J. Holmes, and Lewis A. Beckham, have sold and agreed to convey the said McCulloch Gold Mine tract of land to the Belmont Mining Company for the sum one hundred and twenty-five thousand dollars, of

which eighty-one thousand six hundred and sixty-six $\frac{66}{100}$ dollars
94 are paid to John Peters, James Sloan, Moses L. Holmes, and Reuben J. Holmes, and the balance, forty-three thousand three hundred and thirty-three $\frac{33\frac{1}{3}}{100}$ dollars, to said Lewis A. Beckham, all said interested as aforesaid having agreed to convey all their several interests aforesaid to the Belmont Mining Company, a sure, full, and complete title in fee-simple:

Therefore this indenture made, on this the twenty-second day of June, A. D. 1853, between the said Lewis A. Beckham, of Chester District, in the State of South Carolina, of the one part, and the said Belmont Mining Company of the second part, witnesseth:

That and in consideration of the sum of forty-three thousand three hundred and thirty-three $\frac{33\frac{1}{3}}{100}$ dollars to him in hand paid, the receipt of which the said L. A. Beckham doth hereby acknowledge, he, the said L. A. Beckham, has bargained, sold, aliened, transferred, and conveyed, and by these presents doth bargain, sell, alien, transfer, and convey unto the said Belment Mining Company and their successors all his said interest and estate in the said tract of land, situate and being in Guilford County, known as the McCulloch Gold Mine, on Deep River, ad-
95 joining the lands of the Guilford Mining Company, John Gluyas, & others, bounded as follows, to wit:

Beginning at a stone, the original corner of the Dunning tract, running south with the Hamilton old line one hundred and fifty-one poles to a stone, Gluyas' corner; thence west two hundred poles to a small post-oak, Gluyas' corner; thence north one hundred and fifty-three poles to a stone, Gluyas' corner; thence south 88° east with a marked conditional line two hundred poles to the beginning, containing one hundred and ninety-eight acres more or less, together with all engines, machinery, fixtures, mining apparatus, and implements for mining, all ways, wood, mineral, waters, hereditaments, and appurtenances thereto belonging or in anywise appertaining: To have and to hold to the own proper use and benefit of the said Belmont Mining Company, their successors and assigns forever; and the said Lewis A. Beckham, for himself, his heirs, executors, & administrators, doth covenant and agree to and with the said Belmont Mining Company & their successors and assigns,
96 that he is seized and possessed of the estate hereby conveyed, and has lawful power and authority to convey the same as herein stated, and that he will forever warrant and defend the title to the same against the lawful claims and titles of all persons whatever as far as the part conveyed by him is concerned.

In testimony, &c.

And whereas a question is raised as to the right of the said Belmont Mining Company to purchase and hold real estate in North Carolina; in caution, to avoid difficulty, at the request of the parties interested in getting a title to *to* said land, it is also agreed to convey the same to N. H. Wolf, president of the McCulloch Copper & Gold-Mining Company, his heirs & assigns; the McCulloch Copper & Gold Mining Company being a branch of the said Belmont Mining Company; therefore the said Lewis A. Beckham for the purpose aforesaid, & for the consideration aforesaid mentioned in said deed, doth by these presents bargain, sell, and convey the lands described in the foregoing deed to the said N. H. Wolf, president as aforesaid, & his heirs, to be held by him, managed, conveyed, and disposed of as the said McCulloch
97 Copper & Gold-Mining Company may, by resolution, order, by-law, ordinance, or otherwise direct.

This deed being made at the request of the purchasers, it is expressly

understood and agreed that the same is to create no additional obligation, covenant, or warranty in addition to the said deed being made to vest title in said N. H. Wolf, president as aforesaid, in case the first deed shall fail to pass the title.

In testimony whereof the said Lewis A. Beckham hath hereto set his hand & seal this 31st day of August, A. D. 1853.

[SEAL.]

Signed, sealed, and delivered in the presence of—

The following deed is No. 1, spoken of in the deposition of Will U Steiner.

Deed No. 1, *spoken of by Steiner. Deed from F. W. Davie to Cha's McCulloch, July* 11*th*, 1831.

STATE OF SOUTH CAROLINA:

Know all men by these presents that I, Frederic William Davie, of Chester District, in the State aforesaid, in consideration of five
98 thousand dollars to me paid by Charles McCulloch, of , in the State aforesaid, have granted, bargained, sold, released, and by these presents do grant, bargain, sell, and release unto the said Charles McCulloch my undivided third part of a tract of land containing two hundred acres more or less, lying in Guilford County, in the State of North Carolina, on the waters of Deep River; which said tract of land contains a gold mine and was granted to Teague, and by him or his agent, Horney, conveyed to the said Frederic William Davie, on 1st February, 1828; the said tract being bounded on the north by the lands of David Lindsay, and is more particularly described in the said conveyance to F. W. Davie; and I do hereby convey and release to the said McCulloch the exclusive right to direct and manage the working of the mines now open or to be opened thereon, with the power to retain for himself one-third of the profits of said mines, together with all and singular the rights, members, hereditaments, and appurtenances to the said premises belonging or in anywise incident or appertaining; to have and to hold all and singular my undivided
99 third part of the premises before mentioned unto the said Charles McCulloch, his heirs and assigns forever.

And I do hereby bind myself, my heirs, executors, and administrator to warrant and forever defend all and singular the said premises unto the said Charles McCulloch, his heirs and assigns, against myself and my heirs, and all other persons lawfully claiming or to claim the same or any part thereof.

Witness my hand and seal the first day of January, in the year of our Lord one thousand eight hundred and thirty-one, and in the 55 year of the Independence of the United States of America.

F. W. DAVIE. [SEAL.]

Signed, sealed, & delivered in the presence of—
A. BLANDING.
W. F. DELOUSSUVE.
JAMES WESTBROOK.

STATE OF SOUTH CAROLINA,
Chester District:

JULY 11TH, 1831.

I do hereby certify unto all whom it may concern, that Mary F. Davie, the wife of the within-named F. W. Davie, did this day appear

before me, and upon being privately and separately examined by me, did declare that she did actually join her husband in executing
100 the within release, and that the same was positively and bona fide executed at least seven days before this her examination, and that she did then, and still does at this time, freely, voluntarily, and without any manner of compulsion, dread, or fear of any person or persons whomsoever, renounce, release, and forever relinquish unto the within-named Charles McCulloch, heirs and assigns, all her estate, interest, and inheritance in all and singular the premises within mentioned and released.

Given under my hand and seal this 11th day of July, A. D. 1831.

R. S. BEDONM.

STATE OF SOUTH CAROLINA,
Richland District:

Personally appeared before me William F. Deloupue, and made oath that he saw F. W. Davie sign, seal, and deliver the above conveyance, for the uses and purposes therein mentioned, and that he with A. Blonding, in the presence of each other, witnessed the due execution thereof.

W. F. DELOUSSUVE,

Sworn to before me this twenty-first day of March, 1833.

H. MAXEY, *J. P.*

STATE OF NORTH CAROLINA,
Guilford County:

JAN'Y 27TH, 1875.

101 I, Will U. Steiner, register of deeds & ex officio clerk of the board of commissioners of said county, do hereby certify that foregoing deed & certificates thereon are true copies of the record as found in my office, recorded in book U, 1833, page 48. Witness my hand and seal of said board of com., at office in Greensboro', this Jan'y 27th, A. D. 1875.

WILL U. STEINER,
Clerk & Register of Deeds.

The following is a copy of deed No. 2, spoken of in the deposition of Will U. Steiner:

Deed No. 2, spoken of by Steiner. Deed C. McCulloch to Jno. Gluyas.

This indenture, made this the eighth of January, in the year of our Lord one thousand eight hundred and forty-eight, between Charles McCulloch, of South Carolina, of the one part, and John Gluyas, of North Carolina, of the other part, witnesseth:

That the said Charles McCulloch doth, for and in consideration of the sum of two thousand dollars to him in hand paid by the said John Gluyas, the receipt of which is hereby acknowedged, hath bargained, granted, sold, and quitclaimed, and by these presents doth bargain, quit, sell, and quitclaim to John Gluyas the following tracts of land in the
102 county of Guilford and State of N. Carolina, the first tract on the waters of Deep River, bounded as follows:

Beginning at a stake, Jeremiah Hodson's corner, running north 145 poles to a post-oak shrub; thence east 67 poles to a black oak; thence south 5 poles to a black oak; then east 72 poles to a Spanish oak on the bank of the branch; then south 13 degrees west, Thompson's line, up the various courses of the branch 66 poles to a poplar; thence south 15 de-

grees west 40 poles to a stake; thence east 14 poles to a post oak; thence south 83 poles to a hickory; thence west 16 poles to a post oak; thence north 61 poles to a post oak; thence west on Hodson's line 110 poles to the beginning; formerly owned by R. W. Hodson, containing 117 acres more or less.

The second tract, beginning at a hickory root in Thomas Johnson's line, running south 117 poles to a hickory; thence east 54 poles to a blackjack; thence south 35 poles to a blackjack; thence east 11½ poles to a small post oak; thence north 152½ poles to a black-jack; thence west 68 poles to the beginning, formerly owned by Aaron Hodson, containing by estimation 51¼ acres.

The third tract, beginning at a post oak on G. C. Mendenhall's, line running north 150 poles to a post oak; thence east along Andrew
103 Lindsay's line 86 poles to a post oak; then along this line south 75° east 20 poles to a post oak; thence south 86 poles to a stake; then east 33 poles to a stone; thence south 61 poles to a stone, Thomas Johnson's line; then along his line west 145 poles to the beginning, containing by estimation 111½ acres, formerly owned by Jesse Hodson.

The fourth tract, lying on the waters of Deep River on both sides of the Hay Branch, beginning at a post oak running 211½ poles east, crossing said branch to a red oak; then south 52 poles to a post oak; then west 127 poles to a stone; then south 42 poles to a black oak; then west 84½ poles to some stones; then north 96 poles to the beginning, containing by estimation ninety-two acres, formerly owned by Thomas E. Johnson.

Fifth tract, beginning at McCulloch's corner, black-oak stump in Davis' line, running south along McCulloch's line five poles to his corner-stone; then east along his line eighteen poles to Hodson's corner-stone; then along his line north five poles to Davis' corner, Spanish oak; then along his line 18 poles to the beginning, containing 90 poles of land.

104 Sixth tract. One undivided third part of a tract of land, containing two hundred acres more or less, which said tract of land contains a gold mine, and was granted to Teague, and by him or his agent, Jonathan Horney, convey' to Frederick William Davie, on the 1st February, 1828, and the above named third part granted by F. W. Davie to Charles McCulloch on the first day of January, one thousand eight hundred and thirty-one, together with the exclusive privilege to direct and manage the working of the mines now open, or to be hereaftef opened on said land, with the power to retain for himself one-third or the profits of said mines as convey' by the said Davie to the said McCulloch; the said tract of land is bounded on the north by the lands of David Lindsay and is more particularly described in the conveyance to F. W. Davie: To have and to hold the same, together with the privileges and appurtenances thereunto belonging or in anywise appertaining, to him, the said John Gluyas, his heirs, assigns, executors, and administrators, forever, free and discharged from all incumbrances by any whatsoever, or my heirs, executors, administrators, or assigns, with all mines
105 minerals, woods, ways, and waters, except the one-fifteenth part of all metals which may be found on the lands bought of R. W. Hodson by said McCulloch, which fifteenth is to be paid to said Hodson by the said Gluyas; also one steam-boiler and other articles pointed out, all being at the old steam-mills.

In witness whereof I hereunto set my hand and seal. To make this conveyance plain as possible, it is distinctly understood that the said McCulloch makes a quitclaim deed and transfer, and does not warrant or defend the title either to the land or the right of management out o

the gold mine. In witness whereof I have hereunto set my hand and seal the day and date above written.

CHARLES McCULLOCH. [SEAL.]

Signed, sealed, & delivered in the presence of—
SHEPHERD CURRY.
J. M. WORTH.

NORTH CAROLINA:

The execution of the annexed was this day duly proven before me by the oath of J. M. Worth, the subscribing witness, who, being sworn, testified that he saw the same signed, sealed, and delivered. Let
106 the deed and this certificate be registered.
Feb. 6th, 1846.

JOHN W. ELLIS, *J. S. C. L. E.*

This deed was corrected this day by interlining John Gluyas, & acknowledged by Cha's McCulloch in my presence.
Sep. 30th, 1848.

J. C. WORTH.

STATE OF NORTH CAROLINA,
Guilford County:

I, Will U. Steiner, register of deeds and ex-officio clerk of the board of commissioners of said county, do hereby certify that the foregoing deed and certificate thereon is a true copy of the record as found in my , recorded in book E No. 2, page 651.

In witness whereof I have hereunto set my hand and affixed the seal of said board of commissioners at office in Greensboro' this 24th day of February, A. D. 1875.

[SEAL.]

WILL U. STEINER,
Register of Deeds & Ex-Officio Clerk.

107 The following is a copy of deed No. 3, as spoken of in Will U. Steiner's deposition:

Deed No. 3, spoken of by Steiner. Jno. Gluyas to Peters, Sloan & Co., Feb., 1852.

This indenture, made this 17th February, A. D. 1852, between John Gluyas, of the county of Guilford, and State of North Carolina, of the one part, and James Sloan, John Peters, of the aforesaid county of Guilford, and Moses L. Holmes, of the county of Rowan and State aforesaid, of the other, witnesseth:

That the said John Gluyas, for and in consideration of the sum of five thousand seven hundred and fifty dollars, the receipt whereof is hereby acknowledged, hath bargained, sold, and confirmed, and by these presents doth bargain, sell, and confirm, unto the said James Sloan, John Peters, and Moses L. Holmes, their heirs and assigns forever, the one-third part of a certain tract of land situate in the county of Guilford and State aforesaid, lying on the waters of Deep River, known as the McCulloch mine tract, adjoining the lands of Coffin, Shelly & Co.

Beginning at a stone, the original corner of the Dunning tract, running south with Hamilton's old line one hundred and fifty-one
108 poles to a stone, Gluyas' own corner, thence west with the old line two hundred poles to a small post-oak, Gluyas' corner, thence north

one hundred and fifty-three poles to a stone, Gluyas' corner, thence S. 88½ E. with a marked conditional line two hundred poles to the beginning, containing one hundred and ninety acres, more or less, together with all the ways, woods, waters, mines, minerals, and appurtenances thereunto belonging or in any wise appertaining; and the said John Gluyas doth covenant and agree with the said James Sloan, John Peters, and Moses L. Holmes that he is lawfully seized in fee of the one-third part of the aforesaid land and premises, and that he, his heirs and assigns, shall and will warrant and forever defend the same unto the said James Sloan, John Peters, and Moses L. Holmes, their heirs and assigns, so far forth as title was conveyed to him, the said John Gluyas, by Charles McCulloch, but no further.

In witness whereof the said John Gluyas has hereunto set his hand and seal the day and year above written.

JOHN GLUYAS. [SEAL.]

Signed, sealed, & delivered in presence of—
LEVIN R. KIRKMAN.

109 February term, 1852.

STATE OF NORTH CAROLINA,
Guilford County:

The execution of the foregoing deed was duly proven in open court by the oath of Levin R. Kirkman, the subscribing witness thereto.

Ordered to be registered.

JOHN M. LOGAN, *C. C. C.*

STATE OF NORTH CAROLINA,
Guilford County:

I, Will U. Steiner, register of deeds and ex officio clerk of the board of commissioners of said county, do hereby certify that the foregoing deed, with certificate of the clerk thereon, is a true copy of the record as found in my office, recorded in book "G," No. 2, page 638.

In testimony whereof I have hereto set my hand and affixed the seal of the said board of commissioners at office in Greensboro, February 24th, 1875.

WILL U. STEINER,
Register of Deeds & ex-officio Clerk.

110 The following is a copy of deed No. 4 spoken of in the deposition of W. Steiner:

Deed No. 4, spoken of by Steiner. Peters, Sloan & Co. to Belmont Company, June 22, 1853.

Whereas John Peters, James Sloan, Moses L. Holmes, and Reuben J. Holmes are interested in the McCulloch gold-mining tract in Guilford County, on Deep River, in this deed described as follows, to wit: The owners of one undivided third part in fee simple and as lessees of L. A. Beckham, of Chester district, South Carolina, of the two-thirds up to the 4th day of April, A. D. 1858, paying to the said Beckham by way of rents one-seventh of two thirds of all the gold made and obtained from said mine.

Whereas the said L. A. Beckham in his own right and as trustee for M'r's Julia Bedon, wife of R. S. Bedon, and her children, as the owner of the remaining interest and estate in said land in fee simple; and

whereas the said John Peters, James Sloan, Moses L. Holmes, Reuben J. Holmes, and Lewis A. Beckham have sold said McCulloch gold-mining tract of land to the Belmont Mining Company for the sum of one hundred and twenty-five thousand dollars, of which eighty-one thousand six hundred and sixty-six $\frac{66}{100}$ dollars are paid to John Peters, James Sloan, Moses L. Holmes, & Reuben J. Holmes, and the balance,
111 forty-three thousand three hundred and thirty-three $\frac{33}{100}$ dollars, to said Lewis A. Beckham, and agreed to convey all their several interests aforesaid to the Belmont Mining Company, so as to vest in said Belmont Mining Company a sure, full, and complete title in fee simple:

Therefore this indenture, made on this the twenty-second of June, A. D. 1853, between the said John Peters, James Sloan, Moses L. Holmes and Reuben J. Holmes, said Peters and Sloan of Guilford County, and said M. L. and R. J. Holmes of Rowan County, all of the State of North Carolina, of the first part, and the Belmont Mining Company, of the second part, witnesseth:

That for and in consideration of the said sum of eighty-one thousand six hundred and sixty-six $\frac{66}{100}$ dollars, to them in hand paid, the receipt of which the said Peters, Sloan, M. L. & R. J. Holmes do hereby acknowledge, they, the said John Peters, James Sloan, Moses L. Holmes, and Reuben J. Holmes, have bargained, sold, aliened, transferred, and conveyed, and by these presents do bargain, alien, transfer, and convey, unto the said Belmont Mining Company and their successors, all
112 their said interest and estate in a certain tract of land situated and lying in Guilford County, known as the McCulloch mine, on Deep River, adjoining the lands of the Guilford County Mining Company, John Gluyas, and others, bounded as follows, to wit:

Beginning at a stone, the original corner of the Dunning tract, running south with the Hamilton old line one hundred and fifty-one poles to a stone, Gluyas' corner; thence west two hundred poles to a small post-oak, Gluyas' corner; thence north one hundred and fifty-three poles to a stone, Gluyas' corner; thence south 88° east, with a marked conditional line two hundred poles to the beginning, containing one hundred and ninety-eight acres, more or less, together with all the engines, machinery, fixtures, mining apparatus, and implements for mining, all ways, woods, minerals, waters, hereditaments, and appurtenances thereto belonging or any wise appertaining, to have and to hold to the own proper use and benefit of the said Belmont Mining Company, their successors and assigns, forever; and the said John Peters, James Sloan, Moses L.
113 Holmes, and Reuben J. Holmes, for themselves, their heirs, executors, and administrators, do covenant and agree to and with the said Belmont Mining Company and their successors and assigns that they are seized and possessed of the estate hereby conveyed, and have lawful power to convey the same as herein stated, and that they will forever warrant and defend the title to the same against the lawful claim and titles of all persons whatsoever.

In testimony whereof the said John Peters, James Sloan, Moses L. Holmes, and Reuben J. Holmes have hereunto set their hands and seals.

his
JOHN + PETERS. [SEAL.]
mark.
JAMES SLOAN. [SEAL.]
M. L. HOLMES. [SEAL.]
R. J. HOLMES. [SEAL.]

Signed, sealed, and delivered in the presence of—
ROBERT M. SLOAN.

STATE OF NORTH CAROLINA,
Guilford County:

COUNTY COURT, *Clerk's Office.*

Be it remembered that on this the 16th day of December, A. D. 1853, at office, personally appeared before the undersigned, clerk of the court of pleas and quarter sessions for the county of Guilford, Robert M. Sloan, the subscribing witness, who, after being duly sworn, on
114 his oath proved the signing, sealing, and delivery of the foregoing deed of John Peters, James Sloan, Moses L. Holmes, and Reuben J. Holmes to the Belmont Mining Company.

Let the deed with this certificate be registered.

LYNDON SWAINE, *C. C. C.*

STATE OF NORTH CAROLINA,
Guilford County:

I, Will. U. Steiner, register of deeds and ex-officio clerk of the board of commissioners of said county, do hereby certify that the foregoing deed, with certificate thereon, is a true copy of the record as found in my office recorded in book I, No. 2, page 388.

In witness whereof I have hereuntó set my hand and affixed the seal of said board of commissioners at office in Greensboro' this the 18th day of March, A. D. 1875.

[SEAL.]

WILL. U. STEINER,
Register of Deeds & Ex-officio Clerk.

The following is a copy of deed No. 5 spoken of in Will. U. Steiner's deposition:

115 *Deed No. 5, spoken of by Steiner. Beckham to Belmont Co.*

Whereas John Peters, James Sloan, Moses L. Holmes, and Reuben J. Holmes are interested in the McCulloch gold-mining tract in Guilford County, on Deep River, in this described as follows, to wit:

The owners of one undivided third part in fee-simple, and *and* as lessees of L. A. Beckham, of Chester district, South Carolina, of the other two thirds, up to the 4th day of April, A. D. 1858, paying to said Beckham by way of rent one seventh of two-thirds of all the gold made and obtained from said mine.

Whereas, the said Lewis A. Beckham, in his own right and as trustee for M'r's Julia Bedon, wife of R. S. Bedon, and her children, is the owner of the remaining interest and estate in said land in fee-simple. And whereas the said John Peters, James Sloan, Moses L. Holmes, Reuben J. Holmes, and Lewis A. Beckham have sold and agreed to convey the said McCulloch gold-mine tract of land to the Belmont Mining Company for the sum of one hundred and twenty-five thousand dollars, of which eighty-one thousand and six hundred and sixty-six $\frac{66}{100}$ dollars are paid to John Peters, James Sloan, Moses L. Holmes, and Reuben J.
116 Holmes, and the balance, forty-three thousand three hundred and thirty-three $\frac{33}{100}$ dollars, to said Lewis A. Beckham, all said parties interested as aforesaid having agreed to convey all their several interests aforesaid to the Belmont Mining Company so as to vest in said Belmont Company as sure, full, and complete title in fee-simple.

Therefore this indenture made on this twenty-second day of June, A. D. 1853, between the said Lewis A. Beckham, of Chester district, in the State of South Carolina, of the one part and the said Belmont Mining

Company of the second part, witnesseth, that for and in consideration of the sum of forty-three thousand three hundred and thirty-three $\frac{33}{100}$ dollars to him in hand paid, the receipt of which the said L. A. Beckham doth hereby acknowledge, he the said L. A. Beckham hath hereby bargained, sold, aliened, transferred, and conveyed, and by these presents doth bargain, sell, alien, transfer, and convey unto the said Belmont Mining Company and their successors all his said interest and estate in the said tract of land situate and being in Guilford County, known as the McCulloch gold mine on Deep River adjoining the lands of the Guilford County Mining Company, John Gluyas and others, bounded as follows, to wit:

Beginning at a stone, the original corner of the Dunning tract,
117 running south with the Hamilton old line one hundred and fifty-one poles to a stone, Gluyas' corner; thence west two hundred poles to a small post-oak, Gluyas' corner; thence north one hundred and fifty-three poles to a stone, Gluyas' corner; thence south 88° east, with a marked conditional line, two hundred poles to the beginning, containing one hundred and ninety-eight acres more or less, together with all engines, machinery, fixtures, mining apparatus, and implements for mining, all ways, woods, minerals, waters, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, to have and to hold to the own proper use and benefit of the said Belmont Mining Company, their successors and assigns forever.

And the said Lewis A. Beckham, for himself, his heirs, executors, and administrators, doth covenant and agree to and with the Belmont Mining Company and their successors and assigns that he is seized and possessed of the estate hereby conveyed and has lawful power and authority to convey the same as herein stated, and that he will forever warrant and defend the title to the same against the lawful claims and titles
118 of all persons whatever as far as the part conveyed by him is concerned.

In testimony whereof the said L. A. Beckham hath hereto set his hand and seal.

[SEAL.] L. A. BECKHAM.

Signed, sealed, & delivered in presence of—
JAMES T. MOREHEAD.

STATE OF NORTH CAROLINA,
Guilford County:

COUNTY COURT,
Clerk's Office.

Be it remembered that on this the 23rd day of December, A. D. 1853, at office, personally appeared before the undersigned clerk of the court of pleas and quarter sessions for the county of Guilford, James T. More, head, the subscribing witness, who, after being duly sworn, on his oath proved the signing, sealing, and delivery of the foregoing deed of Lewis A. Beckham to the Belmont Mining Company. Let the deed with this certificate be registered.

LYNDON SWAIN, *C. C. C.*

STATE OF NORTH CAROLINA,
Guilford County:

I, Will. U. Steiner, register of deeds and ex-officio clerk of the board of commissioners of said county, do hereby certify that the foregoing deed with certificate thereon is a true copy of the record as found
119 in my office recorded in Book I, No. 2, page 390.

In witness whereof I have hereunto set my hand and affixed

the seal of said board of commissioners at office, in Greensboro, this 18th day of March, A. D. 1875.

[SEAL.]

WILL. U. STEINER,
Register of Deeds & Ex-Officio Clerk.

The following is a copy of deed No. 6, spoken of in the deposition of Will. U. Steiner:

Deed No. 6, spoken of by Steiner. *F. W. Davie to Hy. A. Davie, Aug. 7, 1831.*

Hyder A. Davie. Deed from F. W. Davie.

STATE OF SOUTH CAROLINA,
Chester District:

Know all men by these presents that I, Frederick W. Davie, of the ate and district aforesaid, for and in consideration of three thousand ollars to me in hand paid by my brother, Hyder A. Davie, of the State nd district, the receipt whereof is hereby acknowledged, have bargained, sold, and released and, by these presents, do bargain, sell, and release to the said Hyder A. Davie one undivided third of a certain tract of
120 land lying and being in the State of North Carolina, and in the county of Guilford, on the waters *on the waters* of Deep River, and on the western side of said river, being the land I bought of John Teague, known as Horney's Gold Mine, adjoining the lands of David Lindsay, Hodgson, and others, containing two hundred acres, more or less. To have and to hold all and singular the above undivided third, together with all emoluments and profits thereunto belonging, to him the said Hyder A. Davie, his heir and assigns forever, and I do hereby covenant and agree to warrant and defend the same to him the said Hyder A. Davie against all persons whatsoever claiming or to claim the same or any part thereof.

In witness whereof I have hereunto set my hand and seal this seventh day of August, 1831.

[SEAL.]

F. W. DAVIE.

Signed in presence of—
EDWARD BELL,
ROBERT HARTNESS.

SOUTH CAROLINA,
Chester District:

Personally appeared Robert Hartness and made oath that he saw F. W. Davie sign, seal, and deliver the within deed for the use and
121 purposes therein mentioned and that he, together with Edward Bell, witnessed the due execution thereof.

ROBERT HARTNESS.

Sworn to and subscribed this 3rd day of Jan'y, 1852, before me.

D. G. STUESAH, *J. P.*

NORTH CAROLINA, *ss:*

The above deed was proven before me in due form of law by the oath of Edward Bell, the witness.

Let it be registered.

December, 1852.

JAMES CHARTUR, *J. C.*

STATE OF NORTH CAROLINA,
Guilford County:

I, John W. S. Parker, register of deeds, in and for the county aforesaid, do hereby certify that the foregoing is a true copy of a deed from F. W. Davie to Hyder A. Davie, as recorded in the register's office, in book I, No. 2, and page 458.

JOHN W. S. PARKER,
Register of Deeds.

Fee for copy, $0.80.
" " search, 25.

$1.05.

122 The following is a copy of deed No. 7, spoken of by Will L. Steiner's deposition.

Deed No. 7, spoken of by Steiner. F. W. Davie to Beckham. Mar. 2, 18.

STATE OF SOUTH CAROLINA:

Know all men by these presents that I, F. W. Davie, of Chester district, and State aforesaid, for and in consideration of the sum of two thousand dollars to me paid by L. A. Beckham, of district and State aforesaid, have granted, bargained, sold, and released, and by these presents do grant, bargain, sell, and release unto the said L. A. Beckham an undivided one-third part of a tract of land, containing two hundred acres, more or less, lying in Guilford County, in the State of North Carolina, on the waters of Deep River, which said tract of land contains a gold mine, and was granted to Teague, and by him or his agent, Jonathan Harney, conveyed to F. W. Davie, on the first of February, 1828; the said tract being bounded on the north by lands of David Lindsay, and is more particularly described in the said conveyance to F. W. Davie, together with all and singular the rights, members, hereditaments, and appurtenances to the said premises belonging, or in anywise
123 incident or appertaining thereto. To have and to hold all and singular the said undivided third part of the premises above mentioned, unto the said L. A. Beckham forever; and I do hereby bind myself, my heirs, executors, and administrators, to warrant forever, defend all and singular the said premises to the said L. A. Beckham, his heirs and assigns, against myself, my heirs, executors, and against all other persons lawfully claiming, or to claim the same, or any part thereof.

Witness my hand and this second day of March, in the year of our Lord one thousand eight hundred and fifty.

F. W. DAVIE. [SEAL.]

Signed, sealed, & delivered in the presence of us.
J. S. PRIDE.
R. H. FUDGE.

THE STATE OF SOUTH CAROLINA,
Chester District:

Personally appeared J. S. Pride and made oath that he saw F. W. Davie sign, seal, and deliver the within deed of conveyance for the use and purposes therein mentioned, and that he, together with R. H. Fudge, in the presence of each other, witnessed the due execution thereof.

J. S. PRIDE.

124 This 2nd day of March, 1850, before me.

R. H. FUDGE, *Magistrate.*

STATE OF SOUTH CAROLINA,
Chester District:

I, R. H. Fudge, one of the magistrates for said district and State aforesaid, do hereby certify unto all whom it may concern, that Mary F. Davie, the wife of the within named F. W. Davie, did this day appear before me, and upon being privately and separately examined before me, did declare that she did freely and voluntarily, without any compulsion, dread, or fear of any person or persons whomsoever, renounce, release, and forever relinquish unto the within L. A. Beckham, his heirs and assigns, all her interest and estate, and also all her right and claim of dower of, in, and to all and singular the premises within mentioned and released.

Given under my hand and seal this 2nd day of March, 1850.

MARY F. DAVIE.

[SEAL.] R. H. FUDGE,
Magistrate.

SOUTH CAROLINA,
Richland District:

Be it known that John S. Pride appeared this day before me,
125 J. N. Witner, one of the judges of the court of appeals from the courts of law of the State aforesaid, who being duly sworn, made oath that he saw Frederick William Davie, otherwise F. W. Davie, sign, seal, and deliver the within deed of conveyance, for the uses and purposes therein mentioned, and he, together with R. H. Fudge, in presence of each other, witnessed the due execution thereof.

Given under my hand this third day of December, A. D. one thousand eight hundred and fifty-one.

J. S. PRIDE.

J. N. WHITNER.

STATE OF NORTH CAROLINA,
Guilford County:

I, Will U. Steiner, register of deeds and ex-officio clerk of the board of commissioners, do hereby certify that the foregoing deed with certificate thereon is a true copy of the record as found in my office recorded in book G, No. 2, page 642.

In witness whereof I have hereunto set my hand and affixed the seal of the said board of commissioners at office in Greensboro', this 18th day of March, A. D. 1875.

[SEAL.] WILL U. STEINER,
Register of Deeds & Ex-officio Clerk, &c.

126 The following is a copy of deed No. "8," spoken of by Will U. Steiner in his deposition:

Deed No. 8, spoken of by Steiner. F. W. Davie to Beckham for use of Julia Bedon, March 2, 1850.

STATE OF SOUTH CAROLINA,
Chester District:

Know all men by these presents that I, Frederick William Davie, of the district and State aforesaid, for and in consideration of the sum of three thousand dollars to me paid by Hyder A. Davie, in his lifetime, have granted, bargained, sold, and released, and by these presents do

grant, bargain, sell, and release unto Lewis A. Beckham, for the use and benefit of M'r's Julia Bedon, wife of R. S. Bedon, and her children, an undivided one-third part of a tract of land containing two hundred acres more or less, lying in the Guilford County, in the State of North Carolina, on the waters of Deep River, which said tract of land contains a gold mine, and was granted to Teague, and by him or his agent, Jonathan Horney, conveyed to the said Frederick William Davie on 1st February, 1828; the said tract being bounded on the north by lands of David Lindsay, and is more particularly described in the said conveyance to F. W. Davie, together with all and singular the rights, mem-
127 bers, hereditaments, and appurtenances to the said premises belonging or in anywise incident or appertaing thereto. To have and to hold all and singular one undivided third part of the premises before mentioned unto the said Lewis A. Beckham for the use and benefit as aforesaid forever.

And I do hereby bind myself, my heirs, executors, and administrato to warrant and forever defend all and singular the said premises unto t said Lewis A. Beckham for the use and benefit of M'r's Julia Bedo wife of R. S. Bedon, and her children against myself, my heirs, execu tors, and administrators, and all other persons lawfully claiming or to claim the same or any part thereof.

Witness my hand and seal this second day of March, in the year of our Lord one thousand eight hundred and fifty.

F. W. DAVIE.

Signed, sealed, & delivered in the presence of us:
J. S. PRIDE.
R. H. FUDGE.

STATE OF SOUTH CAROLINA,
Chester District:

Personally appeared J. S. Pride before me and made oath that
128 he saw F. W. Davie sign, seal, and deliver the within deed of conveyance for the uses and purposes therein expressed, and that he and R. H. Fudge did, in the presence of each other, witness the due execution thereof. Sworn to before me this 2nd day of March, 1850.

J. S. PRIDE.

R. H. FUDGE,
Magistrate.

STATE OF SOUTH CAROLINA,
Chester District:

I, R. H. Fudge, one of the magistrates for said district and State aforesaid, do hereby certify unto all whom it may concern that Mary F. Davie, the wife of the within-named Frederick W. Davie, did this day appear before me, and upon being privately and separately examined before me, did declare that she did freely and voluntarily, without any compulsion, dread, or fear of any person or persons whomsoever, renounce, release, and forever relinquish unto the within-named L. A. Beckham, in trust for the use therein expressed, all her interest and estate and also all right and claim of dower of, in, and to all and singular the premises within mentioned and released.

Given under my hand and seal this 2d day of March, 1850.

MARY F. DAVIE.

129 [L. S.] R. H. FUDGE,
Magistrate.

STATE OF SOUTH CAROLINA,
Richland District:

Be it known that John S. Pride appeared this day before me, J. N. Whitner, one of the judges of the court of appeals from the courts of law of the State aforesaid, who being duly sworn, made oath, that he saw Frederick William Davie, otherwise called F. W. Davie, sign, seal, and deliver the within deed of conveyance for the uses and purposes therein mentioned, and that he together with R. H. Fudge in presence of each other witnessed the due execution thereof.

Given under my hand this third day of December, A. D. one thousand eight hundred and fifty-one.

J. S. PRIDE.

J. N. WHITNER.

THE STATE OF SOUTH CAROLINA:

By his excellency J. H. Meares, governor and commander-in-chief in and over the State aforesaid, to all to whom these presents shall come:

Know ye, that the honorable Joseph N. Whitner, before whom
130 the probate of the annexed deed was taken, is now and was at the time of the taking of the said probate one of the acting judges of the court of appeals from the court of law of the State of South Carolina, and that his annexed certificates to the said deeds are in due form. Therefore all due faith, credit, and authority is and ought to be had and given to his proceedings and certificates as such.

In testimony whereof I have hereunto set my hand and caused to be affixed the seal of the State in the town of Columbia, the eighth of December in the year of our Lord one thousand eight hundred and fifty-one and in the seventy-sixth year of the Independence of the United States of America.

J. H. MEARES.

By the governor:
BENJAMIN PERRY,
Secretary of State.

February term, 1852.

STATE OF NORTH CAROLINA,
Guilford County:

The foregoing deeds, assignments, acknowledgements, and certificates, were produced in open court, and upon inspection of the same by the court it was ordered that all should be registered.

JOHN M. LOGAN, *C. C. C.*

131 STATE OF NORTH CAROLINA,
Guilford County:

I, Will U. Steiner, register of deeds, and ex-officio clerk of the board of commissioners of said county, do hereby certify that the foregoing deed with certificates thereon is a true copy of the record as found in my office recorded in book G, No. 2, page 644.

In witness whereof, I have hereunto set my hand and affixed the seal of the board of commissioners at office in Greensboro, this 18th day of March, A. D. 1875.

WILL U. STEINER,
Register of Deeds & Ex-officio Clerk, &c.

The following is a copy of the transcript of the record spoken of in the deposition of J. N. Nelson and marked "H."

Transcript spoken of by J. N. Nelson.

STATE OF NORTH CAROLINA,
Guilford County:

Transcript of the record in the case of Allen J. Davie & others against Charles McCulloch.

132 I find on the equity minute docket for fall term, 1833, the following, to wit:

Replication & commission.

ALLEN J. DAVIE & OTHERS
vs.
CHARLES MCCULLOCH. } Answer filed 26th Oct., 1833.

The answer of the defendant Charles McCulloch having been filed at this term, this case coming on to be heard upon the bill of complaint, the decretal orders made in this case, and the answer of the defendant, McCulloch, it is ordered by the court that the injunction heretofore granted be so far dissolved as to permit the defendant Charles McCulloch to remove the ore mentioned in the pleadings upon his entering into bond in the sum of fifteen hundred dollars payable to the clerk & master with approved security for every five thousand bushels of ore of the first quality, and like bond in the sum of *the sum of* one thousand dollars for every five thousand bushels of ore of the second quality. Also into a like bond in the sum of five hundred dollars for every five thousand bushels of ore of the third quality, which qualities is to be judged of by the sheriff who is at liberty call in any aid he may think proper in fixing the quality.

133 It is further ordered by the court that the complainant enter into bond, with good security, in the sum of twenty-five hundred dollars ($2,500), to be approved of by the clerk & master, and payable to the defendant, conditional to leave the defendant harmless against all injury sustained by him in consequence of obtaining and continuing this injunction, which bond is to be given by the complainants within one month after they have received notice of the said defendant having commenced working the ore upon his which notice is to be served on one of the complainants, or on John M. Morehead, one of the counsel, and in the event the complainant failing to comply with the above order within the time specified, then, and in that case, the injunction in this case shall be dissolved absolutely, and the defendant be discharged from all obligations imposed by this order.

It is further ordered that the injunction as to all other matters except the one mentioned in the bill, be dissolved, and the injunction as to the balance of the ore be retained, subject to the further order of this court

And at fall term, 1834, in the same docket the following entry is made:

134 ALLEN J. DAVIE
vs.
CHARLES MCCULLOCH. } Continuance under former order.

And at spring term, 1835, I find the following on same docket:

ALLEN J. DAVIE & OTHERS
vs.
CHARLES MCCULLOCH & OTHERS.

Ordered by the court that the clerk and master issue a commission to take the answer of William F. Davie, subject to all just exceptions.

And at fall term, 1835, I find the following on the equity trial docket.

ALLEN J. DAVIE ET AL.
vs.
CHARLES MCCULLOCH.

Original bill, filed April 1834.
Order to issue a commission to take the answer of Will F. Davie, subject to all just exceptions.
Continued.

And at spring term, 1836, I find the following on the trial docket:

ALLEN J. DAVIE & OTHERS
vs.
CHARLES MCCULLOCH.

Set for hearing.
Petition of defendant filed.
Decree. See minutes.

135 *Minutes spring* 1836.

ALLEN J. DAVIE ET AL.
vs.
CHARLES MCCULLOCH.

Set for hearing.
Petition of defendant filed.
The petition of Charles McCulloch filed, and it is ordered by the court, without prejudice to either party on the final hearing of the cause, that the clerk and master shall proceed, after notice to the parties, to take an account of the damages sustained by the defendant, Charles McCulloch, by reason of the injunction heretofore granted in this cause, and the suspension of his operations in working the mine in every department thereof, and that he make report thereof at the next term of this court.

Trial docket, fall term, 1836.

ALLEN J. DAVIE ET AL.
vs.
CHARLES MCCULLOCH ET AL.

Petition of defendant. See minutes.
Master's report filed.

Trial docket, spring term, 1837.

ALLEN J. DAVIE ET AL.
vs.
CHARLES MCCULLOCH.

Master's report filed. Time given to file exceptions.
Continued.

136 Trial docket, spring, 1838.

ALLEN J. DAVIE ET AL.
vs.
CHARLES MCCULLOCH.

Sent to supreme court on affidavit filed.
Ordered that Col. John M. Logan have leave to file his account, and that he be allowed twenty-five dollars for trouble and expense in removing ores, &c.

Minute docket, spring term, 1838.

ALLEN J. DAVIE & OTHERS
vs.
CHARLES MCCULLOCH & OTHERS.

On affidavit filed in the case it is ordered that a transcript and all the original papers be sent to the supreme court, and that Col. John M. Logan be allowed to file his exhibits in the case of his fees, and that he be allowed seventy-five dollars for his services, including his expenses in attending to the duties imposed by the former decree of this court.

Trial docket, fall term, 1838.

ALLEN J. DAVIE ET AL.
vs
CHARLES MCCULLOCH.

On affidavit filed it is ordered to be transferred to supreme court.
137 Leave given J. M. Logan to file his account, and that he be allowed seventy-five dollars for his expense & trouble.
Continued.

Trial docket, spring term, 1839.

ALLEN J. DAVIE & OTHERS
vs.
CHARLES MCCULLOCH.

Sent to supreme court.
Continued for decree supreme court.

Trial docket, spring term, 1840.

ALLEN J. DAVIE & OTHERS
vs.
CHARLES MCCULLOCH.

Continued for supreme court.
Decree of supreme court.

Minute docket fall term, 1840. Supreme court, December term, 1840.

ALLEN J. DAVIE & OTHERS *vs.* CHARLES MCCULLOCH. } 65. E. Guilford.

The deeds mentioned in the rules made at the last term in this cause not having been exhibited and filed in the office of this court by the time therein directed, it is ordered that the plaintiffs' bill do stand dismissed out of this court, with costs to be taxed by the proper officers, but without prejudice to the plaintiffs' right to file another bill.

A true copy.

Test.

J. L. HENDERSON.

138 STATE OF NORTH CAROLINA,
Guilford County:

I, James N. Nelson, clerk of the superior court for the county aforesaid, do hereby certify that the foregoing contains a true transcript of the record in this case so far as the records can be found in this office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at office in Greensboro', this the 18 day of March, 1875.

[SEAL.] J. N. NELSON, *C. S. C.*

B'k account by Lindsay.

The following is a copy of the bank account marked "A," and spoken of in the deposition of Jesse H. Lindsay.

Mess'rs Peters, Sloan & Co., in account with the Bank of Cape Fear, Greensboro', N. C.

Dr.				Cr.		
		$ c.				$ c.
1851. July 28	To cash as per check paid...	2,461 67	1851. July 23	Net of note discounted,		2,461 67
1852. May 8	" " " " " ...	775 00	1852. May 8	Cash.....		1,400 00
" 22	" " " " " ...	804 83	" 22	Balance gold bullion..		179 83
		4,041 50				4,041 50
1853.			1853. June 18	C. of D. Am. Ex. B'k, N. Y.....		50,000 00
July 2	check paid J. P.....	10,000 00	July 2	½ premium on same...		187 50
" 9	" " L. A. B.....	15,000 00				
		29,041 50				54,228 00
						54,228 00
139 1853.	Am'ts forward.....	29,041 50	1853. Sept. 10	New York collection..		28,333 34
July 16	check paid J. A. Gilmer..	1,000 00	" "	½ premium on same....		141 66
Sept. 10	" " M. L. & R. J. H	18,000 00	Oct. 8	Interest on the above.		346 88
" "	" James Sloan.....	18,000 00	" "	½ premium on same...		1 73
Octo. 22	" James Sloan.....	5,000 00	Nov. 12	New York collection..		28,333 33
Nov. 12	" J. P. per Holmes.....	6,000 00	Dec. 17	Interest on same in N. Y		677 40
Dec. 10	" James Sloan.....	1,000 00	" "	½ premium on $28,333.33.....		141 66
" 31	" James Sloan.....	6,846 79		½ premium on $6,846.79.....		3 38
1854. January 7	" John Peters.....	20,846 79	" "	New York collection..		28,333 33
" 21	" James Sloan for B. & B	10,000 00	" "	Interest on same.....		991 65
February 11	" H. & H.....	6,000 00	" "	½ premium on $4,708.31.....		23 54
" 25	" J. A. G.....	2,000 00	1854.			
April 29	" L. A. B.....	16,926 65	May 13	½ premium on N. Y. bill.....		125 00
May 6	" H. Peters.....	723 10				
" 13	" James Sloan.....	297 07				
		141,681 90				141,681 90

The above is a copy of the account as it appears on the individual ledger of the bank.

The following is an extract from the collection book of the same bank:

1853.				
August 10	Jno. L. Colby	Note & interest...	28,333 34	To Franklin Osgood, due 25-28 August, dated June 25, 1853.
" "	same	same....	28,333 33	same, due 25-28 October, " " " "
" "	same	same....	28,333 33	same, due 25-28 December, " " " "

All three are transferred to Peters, Sloan & Co., and paid and placed to their credit. The item in the above account of $50,000 was a deposit in the American Exchange Bank, city of New York, in favor of Franklin Osgood, and transferred and deposited to the credit of Peters, Sloan & Co., by John A. Gilmer, agent.

140 *Order to take depositions.*

Upon application of complainants, by authority of an order heretofore filed, a commission to take depositions was issued by the clerk of this court on the 9th day of February, 1875, directed to Samuel P. Hamilton, J. F. Douglas, and Thomas S. Mills, to take the depositions of Cadwallader Jones, Samuel McAlister, and John I. McLure et al., in the county of Chester, and the town of Yorkville, in the county of York and State of South Carolina, of which due notice of times and places was given. Cadwallader Jones' deposition was taken on the 24th day of March, 1875; Samuel McAlister's on the 25th of same month, and the deposition of John I. McLure on the 29th day of March, 1875, which depositions were filed in office on rule day in April, 1875.

The following is a copy of interrogations for witnesses for the complainants:

Interrogatories for witnesses for the complainants.

THE UNITED STATES OF AMERICA:

Fourth circuit, western district of North Carolina.

WILLIAM R. DAVIE ET AL. *vs.* B. F. BRIGGS ET AL. } In equity.

141 Interrogatories to be propounded to Cadwallader Jones, a citizen of York County, State of South Carolina, a witness to be examined under the annexed commission, on behalf of the complainants in the above-entitled cause.

Questions propounded to Cad. Jones.

First. What is you name, age, occupation, and place of residence, and what was your occupation or profession during the years 1854, 1855, 1856, & 1857?

Second. Are you acquainted with the parties to this suit above named, or with any of them; and, if so, with which of them?

Third. Were you related to Cadwallader Jones, of Hillsboro', North Carolina? If you were, what was your relation to him?

Fourth. Did you know Allen Jones Davie, of North Carolina, and Hyder A. Davie and Frederick W. Davie, of Chester, South Carolina? Were you related to them? If you were, what was your relation to them? State if they are dead or alive. If dead, when did they die, respectively?

Fifth. Did you know William R. Davie, son of Allan Jones Davie, just mentioned? Is he dead or alive? If dead, when did he die and where did he die?

Sixth. Were you retained and engaged as counsel of your father, Cadwallader Jones, to make any claims by him, as trustee of the children of Allen Jones Davie, in relation to any property in
142 Guilford County, North Carolina? If you were so engaged by the said Cadwallader Jones, state fully the nature of the claim you were so engaged by the said Cadwallader Jones to make, and all the circumstances in relation thereto.

Seventh. Do you know of a deed by Frederick William Davie to your father, Cadwallader Jones, conveying certain interests in a gold mine in Guilford County in trust for Allen Jones Davie and his family? Did you read and examine the same, so as to speak as to its contents? Did you ever have such deed in your possession, and for what purpose? If you do know of such deed, what became of it? If lost, what do you know of its loss? Have you a paper purporting to be a copy of the deed? If you have, produce it and attach it to your deposition. When did you receive that copy? From whom did you receive it? Has that copy been in your possession since you received it? Is that copy a true copy, according to your recollection, of the said deed?

Eighth. Did you know of a firm doing business under the name and *and* style of Peters, Sloan & Co.? If you did, who composed that firm? Were John O. Peters, James Sloan, Moses L. Holmes, and
143 Reuben J. Holmes members of it? What relation did the said firm of Peters, Sloan & Co. have to the property mentioned in the said deed and in relation to which you were engaged to make claim for your father, as trustee? Was Louis A. Backham connected with *with* the said firm of Peters, Sloan & Co.?

Ninth. Did the said firm of Peters, Sloan & Co. sell, or had they sold, the said property mentioned in the said deed, and to which you were engaged to make claim for Cadwallader Jones, trustee? If so, to whom? Did you notify the parties to the said sale, or any of them, vendors or vendees, of the claim of the said Cadwallader Jones, as trustee, to the said property? If you notified only some of them, vendors or vendees, which of them did you notify?

Tenth. Was the completion of the sale of the said property delayed by such notification? If so, how long was it so delayed? Were any negotiations had between you and others representing your father, as trustee of Allen J. Davie, and the firm of Peters, Sloan & Co., in relation to the sale of the said property? Was any agreement come to under the said negotiation by you or others representing your father, as such trustee, upon the said negotiation with Peters, Sloan & Co.? If so, state fully its terms. Have you any agreement in writing in
144 relation thereto? If you have, produce it and attach it to your deposition. By whom is the said agreement in writing signed?

Last interrogatory. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or may be material to the subject of this, your examination, or the matter in question in this cause? If yea, set forth the same fully and at large in your answer.

Questions to S. McAliley.

Interrogatories to be propounded to Samuel McAliley, a citizen of Chester County, State of South Carolina, a witness to be examined under the annexed commission, in behalf of the complainants in the above-entitled cause.

First. What is your name, age, occupation or profession, and place of residence?

Second. Are you acquainted with the parties to the suit above named, or either of them; and, if so, with which of them?

Third. Did you know Frederick William Davie? Is he alive or dead? If dead, when did he die? If did know him, what were your business relations with him? Were you acquainted with and were you familiar with his handwriting?

145 Fourth. Do you know anything of a deed executed by Frederick William Davie to Cadwallader Jones in trust for the family of his brother, Allen Jones Davie? If you do know of such a deed, state particularly what you know of it. Is it lost? How came you to know of it? Was it given in your possession? From whom and when did you receive it? What was the relation to Allen Jones Davie of the person from whom you received it? Did you recognize the handwriting in which the body of the deed was written? Did you recognize the signature to the deed? Whose signature was it? Was the signature in the handwriting of Frederick William Davie? Who were the trustees to the deed? Did you recognize the signature of the witness thereto? Are the said witnesses to the deed alive or dead? If dead, when did they die?

Fifth. Do you know what became of the deed? Is it in your possession or is it lost? If you say it is lost, state fully all the particulars of its loss.

Sixth. Look at the papers produced by Cadwallader Jones, the witness just examined in this cause, and say if you recognize it and know anything about it? If you recognize it and know anything about

146 it, state fully how the copy of the said deed came to be made. Who made it, and for what purpose? Do you recognize the handwriting of the person who made it? What was the position of the person who made it to you at the time it was made?

Seventh. If you say that you received the original deed from William R. Davie, son of Allen Jones Davie, state, if you can, when and where he died. Did he die shortly after he left the deed with you? Was the deed lost before his death? Was he endeavoring to recover the deed when taken ill? Was he an inhabitant of Chester or was he only there on a visit when taken ill? What was the place of his residence? What was his business in Chester when taken ill there?

Eighth. Did you know Lewis A. Beckham? Is he alive or dead? If dead, when did he die? Did he die solvent or insolvent? Are you acquainted his handwriting? Look at the paper produced by Cadwallader Jones, the witness just examined in this cause, purporting to be an agreement between Peters, Sloan & Co., and Lewis A. Beckham, on the one side, and Cadwallader Jones, trustee, on the other, and say if you recognize the signature of Lewis A. Beckham thereto.

147 Last interrogatory. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or may be material to the subject of this cause? If yea, set forth the same fully and at large in your answer.

Interrogatories to be propounded to John I. McLure, a citizen of Chester County, State of South Carolina, a witness to be examined under the annexed commission in behalf of the complainants in the above-entitled cause.

First. State your name, age, and occupation. How were you engaged during the year 1854? If you say you were studying law at that time, in whose office and with whom were you so studying law?

Second. Are you acquainted with the parties to this suit, or any of them? If with any of them, with which of them?

Third. Did you know Frederick William Davie? Did you know William R. Davie? Was he a resident of Chester, or was he on a visit there when he died? On what business was he in Chester when he died?

148 Fourth. Do you know anything of a deed executed by Frederick William Davie to Cadwallader Jones in trust for the family of Allen Jones Davie? If you do know of such a deed, state particularly what you know of it. How came you to know of it? Did you make a copy of it? By whose direction did you make the copy? For what purpose did you make the copy? Look at the paper produced by Cadwallader Jones, the witness already examined in this cause, and say if that paper is the copy you made. Is it in your handwriting? Is it a correct copy of the deed from F. W. Davie to Cadwallader Jones, in trust?

Last interrogatory. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

DILLARD & GILMER.
Atto's for Complainants.

149 THE UNITED STATES OF AMERICA:

Fourth circuit, western district of North Carolina. In equity.

WILLIAM RICHARDSON DAVIE & OTHERS
against
B. F. BRIGGS & OTHERS.

Cross int. for C. Jones.

Cross-interrogatories to be propounded to Cadwallader Jones, a citizen of York County, State of South Carolina, in reply to the interrogatories of complainants when said witness is examined under a commission to be examined in the above-entitled cause.

First. How you know that the defendants, Moses L. Holmes and Reuben J. Holmes, ever belonged to the firm of Peters, Sloan & Co.

Second. Did you ever notify the defendants, Moses L. Homes and Reuben J. Holmes, or either of them, that Cadwallader Jones, as trustee, had any claim on the real estate alleged to have been conveyed by Frederick William Davie to Cadwallader Jones in trust? If you gave any such notice, when and in what way was it done?

Third. Did you ever have any negotiations with the defendants, M. L. Holmes & R. J. Holmes, or either of them, in relation to the sale of said property? If such negotiations were ever had with others

150 than the above-named defendants, how do you know that these two defendants ever had any knowledge thereof? How do you know that Peters, Sloan & Co. ever authorized Lewis A. Beckham to enter into any negotiations for them concerning said real estate?

Fourth. If any agreement was made by you or others representing your father as such trustee upon any negotiations with Peters, Sloan & Co., how do you know that it was done with the knowledge or assent of the defendants, the two Holmes, or that they ever had knowledge thereof, or ever assented thereto? How do you know that Lewis A. Beckham ever had any authority from Peters, Sloan & Co. to enter into any agreement with your father as trustee relative to said property?

Fifth. If Peters, Sloan & Co. violated any agreement entered into relative to said real estate, what year did it occur; and why did not you, as your father's agent and attorney, notify him of such failure; and why was not suit brought by him for violating said agreement?

Sixth. How far did your father live from the mining property mentioned in the alleged deed from Frederick William Davie to Cadwallader Jones, and in what year did he die?

McCORKLE & BAILEY,
Sol'rs for Def'ts M. L. Holmes & R. J. Holmes.

151 And on rule day in April, 1875, the following depositions were filed in words and figures as follows, to wit:

WILLIAM R. DAVIE AND OTHERS
against
B. F. BRIGGS, MOSES L. HOLMES, REUBEN J. Holmes and others.

Dep. of Cad. Jones.

The answer of Cadwallader Jones, a witness produced, sworn, and examined on behalf of the complainants in the above-stated case by virtue of a commission issued out of the circuit court of the United States for the western district of North Carolina to us directed and hereunto annexed to the interrogatories thereto.

1st. In answer to the first interrogatory the witness says: Cadwallader Jones; age, 61; occupation, farmer; residence, York County, South Carolina; practised law in North Carolina until 1856.

2nd. In answer to second interrogatory the witness says: I know most of the plaintiffs; some of them I don't know. I know B. F. Briggs, Ja's Sloan, Mary F. Davie, Mary McCrady, Edward McCrady, and most of the other defendants, but I do not know John O. Peters, Moses
152 L. Holmes, or Reuben J. Holmes.

In answer to 3 & 4th interrogatories the witness says:

3rd. I am the son of Cadwallader Jones, of Hillsboro', North Carolina.

4th. I know Allen Jones Davie, of N. C.; and Hyder A. and Fred. W. Davie, of South Carolina; they were my first cousins; they are all dead. Hyder died in the year 1848; Fred. W. Davie died in the year 1850. As to Allen Jones Davie, the precise time of his death has never been ascertained, but he perished (it is supposed) in the Indian Territory April or January, in the year 1851, and has never been heard of since.

In answer to 5th interrogatory witness says:

5th. I knew William R. Davie, son of Allen Jones Davie. He is dead. He died in Chester, South Carolina, in the year 1854. I believe in the month of March or April of that year.

In answer to 6th interrogatory witness says:

6th. I was retained by my father and William R. Davie, son of A. J. Davie, to establish a claim of my father to certain lands in Guilford County, N. C., known as the McCulloch gold mines, what I was instructed had been conveyed to my father as trustee for A. J. Davie and his children by F. W. Davie, of South Carolina.

153 7. My impression is that I saw the deed in the possession of Allen Jones Davie when lived in Hillsboro', N. C., and that I read it, but cannot speak of its contents. I have frequently heard him speak of his interest in the McCulloch gold mine; his opinion was that there was gold enough there to pay the debt of England. I have also heard him speak of having procured his brother, F. W. Davie, to purchase it with the understanding that he (Allen J. Davie) was to have a third interest upon being engaged as counsel in the fall of 1853. I was informed that the deed had been sent to William R. Davie, son of A. J. Davie, then in South Carolina, to have it proved, and that he had left it with Samuel McAliley, counsellor of law, Chesterville, S. C. I immediately corresponded with William R. Davie on the subject, inserting a copy of the deed. I soon after received a copy from the office of M'r McAlilley under cover of a letter from D'r Pride, then residing in Chesterville, S. C., which copy has been in my possession ever since, and is herewith annexed marked "A." Soon after obtaining this copy, to wit, in the fall of the year 1853, I came to South Carolina, and

154 when I met by appointment W'm R. Davie at the house of H. J. Pride, in Chester County, W'm R. Davie informed me that the deed was in the hands of McAliley, at Chesterville, and sent a messenger with the request that McAliley would send him the deed; for answer he received a note to the effect that the deed could *could* not be found.

8. By reputation I know of the firm of Peters, Sloan & Company. J. O. Peters, James Sloan, Moses L. Holmes and Reuben J. Holmes I understood were members of it. The firm I understood owned one-third ($\frac{1}{3}$) of the mine. I do not know that L. A. Beckham was connected with the firm.

9. I understood that Peters, Sloan & Company sold to the Belmont Mining Company. This sale was effected before I knew anything about it. I did not therefore notify the firm, or any of them of the claim of my father. I do not know of my own knowledge that the completion of the sale was delayed by any notification. There were negotiations between myself and L. A. Beckham at spring term of Guilford superior court in 1854, respecting the claim of my father as trustee of A. J. Davie and his children. Ja's Sloan, of the firm of Peters, Sloan & Co., was

155 present. He, with L. A. Beckham and John A. Gilmer, counsellor at law, called at my room, when an agreement in writing drawn up by John A. Gilmer has signed in my presence by L. A. Beckham. Gilmer acted as attorney for L. A. Beckham. The agreement was delivered to me by L. A. Beckham, and has been in my possession ever since, and is herewith attached marked "B." James Sloan had the money ready to pay over, but he would not pay until said paper was signed by L. A. Beckham.

In answer to the first cross interrogatory witness says: I only knew that Moses L. Holmes and Reuben J. Holmes belonged to the firm of Peters, Sloan & Co., separative.

In answer to 2d & 3d interrogatories witness says: I never gave Reuben J. Holmes or Moses L. Holmes any notice of the claim of Cad-

wallader Jones, trustee. 3d. I never had any negotiations with Reuben J. Holmes or Moses L. Holmes in relation to the sale of said property. I do not know that they ever had any knowledge of the negotiations about said sale; James Sloan was present at the negotiations with L. A. Beckham, which resulted in the execution and delivery of the paper marked "B," hitherto annexed. I do not remember that he was
156 present at the actual signing of the paper by L. A. Beckham.

In answer to 4th interrogatory:

4. I do not know that the two Holmes had any knoweldge of the negotiations referred to or assented to them. I do not know that Lewis A. Beckham had any authority from Peters, Sloan & Co. to enter into an agreement with my father as trustee, except as expressed in the paper marked "B," and except Ja's Sloan was present at the negotiations which resulted in the execution of said paper. After the death of Allen Jones Davie, which occurred in 1851, the property belonged by the terms of the deed to the children absolutely; they were all non-residents. His son W'm R. Davie, who resided in Alabama, was on a visit to this State in the fall of 1853, and was at Chester, looking after this business, when he took sick and died as before mentioned, in the spring of 1854. Up to the time of his death he had been unable to find the deed, as he informed me. I quit the practice of law in the year 1856. I. My father lived some (60) sixty miles from the mining property, and died in the spring of 1875.

CAD'R JONES.

Witness our hands & seals this 24th March, 1875.

JNO. F. DOUGLAS, [L. S.]
S. P. HAMILTON,
Commissioner.

157 A.

Deed of F. W. Davie to Cad. Jones, as trustee.

STATE OF SOUTH CAROLINA,
Chester District:

Know all men by these presents that I, F. W. Davie, of the district and State aforesaid, in consideration of one dollar to me in hand paid, and for divers other considerations, me thereunto moving, have granted, bargained, sold, and released, and by these presents do grant, bargain, sell, and release unto Cadwallader Jones, of Orange County, North Carolina, and his heirs forever, upon the trusts hereinafter set forth, one undivided third part of a tract of land containing two hundred acres, more or less, lying in the county of Guilford, State of North Carolina, on the waters of Deep River, and on the west side thereof; bounded by the lands of Lindsay Hodgson, and others, which said tract of land was purchased by me from John Teague, and is commonly known by the name of Horney's gold mine, with all the rights, privileges, and appurtenances to the said undivided third part of the said tract of land belonging or in any wise incident or appertaining. To have and to hold all and singular the premises aforesaid, being the undivided third part of the tract of land aforesaid, to him the said Cadwallader Jones, and his heirs forever, upon the following trust, that is to say, in trust
158 to permit Allen Jones Davie and Rosa S. Davie, his wife, and their children, William R. Davie, Allen Jones Davie, Sally Jones Davie, Rosa B. Davie, and Julia Davie, and such other children of the said

Allen Jones Davie and Rosa L. Davie as may hereafter result from their marriage, to have and receive the rents, profits, and issues of the said premises *all* of all mines found thereon, whether now opened or hereafter to be opened, for the joint use of the said Allen Jones Davie and his wife Rosa, and their children, during the life of the said Allen Jones Davie, father of the said children, and the receipts of the said Allen J. Davie, last named, to the said Cadwallader Jones, his heirs or devizees, for the use, management, rents, and profits of said mine, shall be held and deemed a sufficient voucher to the said Cadwallader, and his heirs, for the faithful performance of the trust as well towards the said Allen J. Davie, as his wife Rosa, and his children during the life of the said Allen J. Davie, and after his death to permit the said Rosa Davie, his wife, and the children of the said A. J. Davie, to have and to receive the rents and profits of the said premises, and of all the mines worked thereon during the life of the said Rosa L. Davie, and after her death to convey the said premises to their said children, and to the issue or issues of such, if any, as may be dead, free, and discharged from all trusts whatsoever, and the said Cadwallader Jones may by will,
159 devise said trust with similar limitations and conditions, and he is hereby authorized to sell and convey the said mine with the consent of the said F. W. Davie and Allen J. Davie, and appropriate the proceeds thereof to the purchase of lands, negroes, or bank-stock, and apply the same to the use of above named, and under similar conditions to fulfil the intentions of the above trust.

And whereas the above-mentioned mine has been worked as a joint concern, under the management of the said F. W. Davie, and the accounts of the same are yet unsettled, now this conveyance of the one-third of said tract of land and mine or mines is made upon the express condition that the said third hereby conveyed is to be subject to and liable for one-third of whatever amount may be ascertained on a settlement to have been expended by the said F. W. Davie in working said mines heretofore, and the said Cadwallader Jones is to pay and satisfy the same out of the rents, issues, and profits of the premises hereby conveyed in trust to him as aforesaid.

And I, the said F. W. Davie, do hereby bind myself to warrant and forever defend all and singular the said premises unto the said Cadwallader Jones, against myself and my heirs, and all persons lawfully claiming or to claim the same under me or them, but against the law-
160 ful claims of no other person or persons whatever.

In witness whereof I have hereunto set my hand and seal this fifteenth day of January, in the year of our Lord one thousand eight hundred and thirty-three.

F. W. DAVIE. [L. S.]

Signed, sealed, & delivered in presence of—
HY A. DAVIE.

Having advanced to A. J. Davie five hundred and fifty-nine dollars I do also make the above conveyance answerable to the above demand.

F. W. DAVIE. [L. S.]

HY A. DAVIE.
ALEX'R CRAWFORD.

Agreement of L. A. Beckam.

STATE OF NORTH CAROLINA,
Guilford County:

Whereas Peters, Sloan & Co., held one-third of the McCulloch gold mine in Guilford County under John Gluyas, Charles McCulloch, & William F. Davie, and whereas they had a lease from Lewis A. Beckham in his own right & as trustee for M'r's Julia Bedon for two-thirds of said mine for a period the lease will show. Whereas said Peters, Sloan & Co. worked said mine for some year or two and paid $\frac{1}{7}$ of the $\frac{2}{3}$rd of all the gold extracted whilst they worked the mine to said Lewis A.
161 Beckham for himself & as trustee aforesaid.

Whereas Peters, Sloan & Co. sold their interest in said mine for $82,333.33. Whereas Lewis A. Beckham sold his interest in said mine for $21.666.66⅔ & his interest as trustee aforesaid at the same sum.

Whereas Col. Cad. Jones, of Hillsboro, as trustee, claims the one-third of said mine as trustee for Allen J. Davie, wife, & children, as he alleges under a deed from William F. Davie.

Whereas James Sloan, one of the firm of Peters, Sloan & Co., collected for Lewis A. Beckham his part and the part of Julia Bedon, to wit, $43,666.66⅔.

Whereas it is the wish of all the parties for the said several parties to receive their said several purchases without prejudice to the legal or equitable claim of Col. Cad. Jones.

It is agreed that whatever claim the said Cad. Jones had in said gold mine he shall have against the several parties who have sold and received the purchase-money, each one being answerable to the rights and claims of said Jones out of the purchase-money instead of the land itself.

And the said Lewis A. Beckham hereby agrees to acknowledge service of any bill in equity which the said Cad. Jones and his cestue
162 que trust may in equity file against himself or against himself & others in Guilford County, North Carolina, wa'ving all question as to to settle any and all questions of left & right which the said Cad. Jones, trustee, or his cestue que trusts have or may have for the said purchase-money, or the rents and profits received whilst he had anything to do with said mine.

April 28th, 1854.

L. A. BECKHAM.

Deposition of McAliley.

WILLIAM R. DAVIE & OTHERS
against
B. F. BRIGGS, MOSES L. HOLMES, REUBEN J. HOLMES, & others.

The answer of Sam McAliley, a witness produced, sworn, and examined on behalf of the complainants in the above-stated case by virtue of a commission issued out of the circuit court of the United States for the western district of North Carolina to us directed and hereunto annexed, to the interrogatories and cross-interrogatories thereto.

1st. In answer to the first interrogatory the witness says. Sam'l McAliley. Aged 76. Occupation, planter and lawyer. Residence, Chester. Been a lawyer for 45 years.

163 Second interrogatory, witness says: I know none of the plaintiffs. I know Mary F. Davie, widow of Fred. Davie, Churchill B.

Jones, Frederick E. Fraser, and no other of the defendants. In answer to this interrogatory witness says: Third. I knew Fred. W. Davie; he is dead. I think he died about 1850. I was his lawyer. I knew his handwriting.

In answer to 4 interrogatory witness says:

4th. I knew of a deed executed by Fred. W. Davie to Cadwallader Jones in trust for the family of his brother Allen Jones Davie. The deed was brought to the office of McAliley & McLure, attorneys at law, by D'r W'm R. Davie, to have the opinion of the firm what his rights under it were. It was delivered to us and remained in our possession some time. D'r W'm R. Davie was the son of Allen Jones Davie. I do not recollect positively in whose handwriting the body of the deed was; my impression is that it was in that of Fred. W. Davie. The signature was that of Fred. W. Davie. The trustee was Col. Cadwallader Jones, of Hillsboro', N. C. The witnesses to the deed are both dead. I recognized their signatures.

In answer to the 5th interrogatory witness says:

5. The deed is not now in my possession. Whilst the deed was in our possession D'r W'm R. Davie wrote us from North Carolina to
164 send him the original or a copy of the deed. Thinking it was too valuable a paper to entrust to the mails, a copy was made by my partner, J. J. McLure, and compared with the original, and the copy so made was forwarded either to D'r Davie or Col. Jones. Diligent search has been made in the office for the original deed and I am satisfied that it is not there. Some time after the copy of the deed was forwarded to Col. Jones, one of the young Prides, I cannot say which, came to the office and said D'r Davie requested the deed to be sent to him, and the deed was delivered according to said message.

In answer to 6th interrogatory witness says:

6. I have examined the paper marked "A," and recognize it as a copy of the deed to D'r Davie or Col. Jones. It is in the handwriting of my former partner, J. J. McLure. I have already stated how it came to be made.

In answer to 7th interrogatory witness says:

7. W'm R. Davie died in Chester in February or March, 1854. It was some time after he left the deed with me before he died. My impression is that the deed was taken out of our office before his death. I do not recollect whether he was endeavoring to recover the deed before taking ill. He lived in Alabama. He was only at Chester on a visit
165 endeavoring to recover his property.

In answer to the 8th interrogatory, witness says:

8. I knew Lewis A. Beckham; he is dead; died in 1860 or 1861; his estate is entirely insolvent. I am acquainted with his handwriting; had examined the paper marked "B"; the signature is that of Lewis A. Beckham.

In answer to last interrogatory, witness says: I know nothing more that would benefit plaintiffs.

SAM'L McALILEY.

Witness our hands & seals this 25th day of March, 1875.

JNO. F. DOUGLAS. [L. S.]
S. P. HAMILTON. [L. S.]

Dep. of J. J. McLure.

WILLIAM R. DAVIE AND OTHERS
against
B. F. BRIGGS, MOSES L. HOLMES, REUBEN J. Holmes, and others.

The answer of J. J. MCLURE, a witness produced, sworn, and examined on behalf of the complainants in the above-stated case, by virtue of a commission issued out of the circuit court of the United States for the western district of North Carolina, to us directed and hereunto annexed, to the interrogatories and cross-interrogatories thereto.

1st. In answer to the first interrogatory the witness says: Jno.
166 J. McLure, aged 47; by profession, an attorney at law.

2nd interrogatory. I was engaged in 1854 in the practice of law, in partnership with Sam'l McAliley. I knew of the plaintiffs; of the defendants; I knew B. F. Briggs, Mary E. Fraser, and Fred. E. Fraser.

3. I knew Fred. W'm Davie and W'm R. Davie; they are both dead; Fred. W'm Davie died in 1850, and W'm R. Davie died in Chester while on a visit there, looking after his interest in the Davie lands. He was not a resident of Chester.

4. I knew of a deed executed by Fred. W. Davie to Cad. Jones, in trust for the family of Allen Jones Davie. The deed in question was handed to me by Sam. McAliley, my partner, with the request to make an accurate copy of it, which I did, with great care. The object in making the copy was to send it to some ones of the Jones family, at Hillsboro', N. C., the parties being afraid to risk the original by mail. I have examined the paper marked "A." It is in my handwriting, and is the copy made by me on that occasion and for that purpose. I have no hesita-
167 tion in saying that it is a correct copy of the deed made on that occasion and for that purpose. and is the only copy I ever made.

In answer to last interrogatory, witness says: I was acquainted with both the signatures of Col. W. F. Davie, the maker of the deed, and Hyder A. Davie, the attesting witness, & the signatures to the original deed I know to be genuine.

JOHN J. MCLURE.

Witness our hands and seals this 29th day of March, 1875.

JNO. F. DOUGLAS. [L. S.]
S. P. HAMILTON. [L. S.]

Answer of A. C. Jones et al.

The following is a copy of the answer of Allen C. Jones et al. to the bill of complaint of William R. Davie et al.:

THE UNITED STATES OF AMERICA.

Fourth circuit. The western district of North Carolina.

The joint and several answer of Allen C. Jones, a citizen of Alabama; Cadwallader Jones, a citizen of South Carolina; Pride Jones; Mary C. Ruffin, wife of Peter Ruffin, and Sally R. Collins, wife of Jasiah Collins, citizens of North Carolina, who have been impleaded with Moses L. Holmes and Reuben J. Holmes, citizens of North Caro-
168 lina, and others, to the bill of complaint of William R. Davie, a citizen of Texas, and others.

These defendants, now and at all times hereafter, saving and reserving unto themselves all and all manner of benefit and advantage of exception that can or may be had or taken to the many errors, uncertainties, insufficiencies, and other imperfections in the complainants' bill of complaint contained, for answer thereto, or unto so much thereof as these defendants are advised is material or necessary for them to answer unto, answering for themselves, say that they, together with Mary P. Jones, Rebecca Jones, Sarah Jones, Robin Jones, and Lucy C. Jones, infant children of their deceased brother, Rob. Ap C. Jones, are the only heirs at law of their deceased father, the late Cadwallader Jones, of Hillsboro', North Carolina.

And these defendants, Allen C. Jones, Pride Jones, Mary C. Ruffin, and Sally R. Collins, answering for themselves, say that they do not know anything of their own knowledge of the matters, facts and things stated in the complainants' bill; that they have heard that there was some such deed as that mentioned in the said bill, whereby the said Frederick William Davie conveyed to their late father, Cadwallader Jones, some interests in gold mines in Guilford County, North Carolina, upon certain trust for the family of his brother Allen Jones Davie, but they have never seen said deed, and know nothing further about, except that they have been informed that by the terms of the trust contained in the said deed the estate of their father as trustee terminated upon the death of the said Allen Jones Davie, which, as these defendants have been informed, is supposed to have taken place some time in the year 1851, though, as they believe, the precise date has never been positively ascertained, he having perished, as stated in the complainants' bill, as is supposed, while on a journey through the Indian Territory in that year.

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And the defendant, Cadwallader Jones, answering for himself, and not for others, says that he is a lawyer by education, practised his profession in North Carolina until 1856, and that he removed from that State in the spring of 1857; that in the fall of 1853 he was retained by his father and William R. Davie, son of the said Allen Jones Davie, to advise them in reference to a claim of the said Cadwallader Jones as trustee of said Allen J. Davie and family, to certain mines in Guilford County; that this defendant was instructed that Allen J. Davie having discovered that the lands described in the complainants' bill of complaint were valuable on account of deposits of gold and other ore, contracted with the owner thereof to purchase the same at a certain price; that having no means himself, the said Allen J. Davie induced his brother, the said Frederick William Davie, to make the purchase, with a view to their mining the same to their joint benefit; that the said Frederick William Davie did thereupon purchase the same, and afterwards, in pursuance of the said understanding, about the year 1833 conveyed to the said Cadwallader Jones one undivided third part of the said mine in trust for the said Allen Jones Davie and his family; that shortly previous thereto the said Frederick William Davie conveyed one undivided third part of said mine to one McCulloch, and one other undivided third part to his brother, Hyder A. Davie; that the said Allen J. Davie had been for many years in possession of said deed from his brother, Frederick William Davie, claiming publicly one undivided third part of said mine; that shortly before the death of said Allen J. Davie he had sent the said deed to his son, William R. Davie, to have the same proved and registered; that it had been left by the said William R. Davie with Samuel McAliley, counsellor at law, residing in Chester, South Carolina.

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And the defendant, further answering, says that upon being re-
171 tained as aforesaid, he immediately wrote to William R. Davie, then in South Carolina, for a copy of said deed, which said copy he caused to be promptly forwarded; a copy of which copy is hereto annexed as Exhibit A.

Learning that said deed had not been proved and registered, this defendant, soon after the receipt of the said copy, to wit, in the fall of 1853, met the said William R. Davie by appointment in Chester, South Carolina, expecting to obtain from him the original deed, and to attend to the probate and registration thereof, when this defendant was informed that the original deed was lost. This defendant then advised the said William R. Davie to procure the attendance of witnesses to prove the execution of said deed as a lost paper. This the said William R. Davie afterwards informed this defendant he had endeavored to do, but was unable to effect; that shortly after the said William R. Davie died, while in Chester, South Carolina, as this defendant believes, attending to this business.

And this defendant, further answering, says that at the spring term of Guilford superior court, 1854, he had a conference with Lewis A. Beckham, James Sloan, of the firm of Peters, Sloan & Co., and John A. Gilmer, counsellor at law, which resulted in the execution and de-
172 livery of an agreement in writing, signed by Lewis A. Beckham, and dated the 28th April, 1854, a copy of which said agreement is hereto attached, as Exhibit B, and is hereby referred to as part of this answer.

The agreement aforesaid was made under these circumstances: The said James Sloan, because of the claim of Cadwallader Jones, trustee as aforesaid, had declined paying over to the said Lewis A. Beckham that portion of the proceeds of the sale of the mine claimed by him in his own right, whereupon the said Lewis A. Beckham was about to apply to the court then sitting to compel said payment, and for such other damages as he had sustained by reason of said detention. This defendant being unable either to produce the original deed conveying the property aforesaid, or to establish it as a lost paper, entered into the negotiation which was drawn by the said John A. Gilmer, the said James Sloan being present at the negotiation. And this defendant, further answering, says that as to the sale of the mines to the Belmont Mining Company, he does not remember to have heard of it until recently, before the negotiation aforesaid, and whether the said Allen J. Davie ever entered into actual possession of said mine with his cotenants he is unable to say.

And these defendants, Allen C. Jones, Cadwallader Jones, Pride Jones, Mary C. Ruffin, and Sally R. Collins say that the legal
173 estate which their father, Cadwallader Jones, had in the premises was not disposed of by him in his will, and indeed expired with the death of Allen Jones Davie, now fully established by the length of time since he has been heard from; that they have no interest in the subject-matter of the suit, and pray to be hence dismissed, with their reasonable costs in this behalf sustained.

A. C. JONES.
CADWALLADER JONES.
PRIDE JONES.
MARY R. RUFFIN.
SALLY R. COLLINS.

Personally appeared before me Cadwallader Jones, one of the defendants above named, and made oath that the matters, facts, and things stated in the foregoing answer are true, so far as the same are derived from the knowledge of this defendant, and so far as they are derived from the knowledge of others, he believes them to be true.

CAD'R JONES.

Sworn to before me this 19th day March, A. D. 1875.
[SEAL.]

D. J. PRIDE,
Trial Justice.

174 *Deed from F. W. Davie to Cad. Jones.*

EXHIBIT A.

STATE OF SOUTH CAROLINA,
Chester District:

Know all men by these presents that I, F. W. Davie, of the district and State aforesaid, in consideration of one dollar to me in hand paid, and for divers other considerations me thereunto moving, have granted, bargained, sold, and released, and by these presents do grant, bargain, sell, and release unto Cadwallader Jones, of Orange County, North Carolina, and his heirs forever, upon the trusts hereinafer set forth, one undivided third part of a tract of land containing two hundred acres, more or less, lying in the county of Guilford, State of North Carolina, on the waters of Deep River, and on the west side thereof, bounded on the lands of Lindsay, Hodgson and others, which said tract of land was purchased by me from John Teague, and is commonly known as Horney's gold mine, with all the rights, privileges, and appurtenances to the said undivided third part of the said tract of land belonging, or in anywise incident or appertaining; to have and to hold all and singular the premises aforesaid, being the undivided third part of the tract
175 of land aforesaid, to him the said Cadwallader Jones and his heirs forever, upon the following trusts, that is to say, in trust to permit Allen Jones Davie and Rosa L. Davie, his wife, and their children, William R. Davie, Allen Jones Davie, Sally Jones Davie, Rosa B. Davie, and Julia Davie, and such other children of the said Allen Jones Davie and Rosa L., his wife, as may hereafter result from their marriage, to have and receive the rents, profits, and issues of the said premises, and of all mines found thereon, whether now open or hereafter to be opened, for the joint use of the said Allen Jones Davie and his wife Rosa, and their children during the life of the said Allen Jones Davie, father of the said children, and the receipts of the said Allen J. Davie last named, to the said Cadwallader Jones, his heirs or devisees, for the use, management, rents, & profits of said mine shall be held and deemed sufficient voucher to the said Cadwallader and his heirs for the faithful performance of the trust, as well towards the said Allen Jones Davie and his wife Rosa, and his children during the life of the said Allen J. Davie. And after his death to permit the said Rosa Davie, his wife, and the children of the said A. J. Davie, to have and receive the rents and profits of the premises, and of all mines worked thereon during the
176 life of the said Rosa L. Davie, and after her death to convey the said premises to the said children, and to the issues of such, if any, as may be dead, free and discharged from all trusts whatever, and the said Cadwallader Jones may by will devise said trusts with similar limitations and conditions, and he is hereby authorized to sell and con-

vey the said mine with the consent of the said F. W. Davie and Allen J. Davie, and appropriate the proceeds thereof to the purchase of lands, negroes, or bank-stock, and apply the same to the uses above named, and under similar conditions to fulfill the intentions of the above trust.

And whereas the above-mentioned mine has been worked as a joint concern under the management of the said F. W. Davie, and the accounts of the same are yet unsettled:

Now this conveyance of the one-third of said tract of land and mine or mines is made upon the express condition that the said third hereby conveyed is to be subject to and liable for one-third of whatever amount may be ascertained in a settlement to have been expended by the said F. W. Davie in working said mine heretofore, and the said Cadwallader Jones is to pay and satisfy the same out of the rents, issues, and profits of the premises hereby conveyed in trust to him as aforesaid.

177 And I, the said F. W. Davie, do hereby bind myself to warrant and forever defend all and singular the said premises unto the said Cadwallader Jones against myself and my heirs, and all persons lawfully claiming or to claim the same under me or them, but against the lawful claims of no other person or persons whatever.

In witness whereof I have hereunto set my hand seal this fifteenth day of January, in the year of our Lord one thousand eight hundred and thirty-three.

(Signed) F. W. DAVIE. [L. S.]

Signed, sealed, and delivered in the presence of –
HY. A. DAVIE.

Having advanced to A. J. Davie four hundred and fifty-nine dollars, I do also make the above conveyance answerable to the above demand

F. W. DAVIE. [L. S.]

HY. A. DAVIE.
ALEX'R CRAWFORD.

Ex. B.

Agreement of Beckham.

The following is a copy of the agreement of Lewis A. Beckham, and marked "Exhibit B."

STATE OF NORTH CAROLINA,
Guilford County:

Whereas Peters, Sloan & Co. held one-third of the McCulloch
178 gold mine in Guilford County, under John Gluyas, Charles McCulloch, & William F. Davie, and whereas they had a lease from Lewis A. Beckham in his own right, and as trustee of M'r's Julia Bedon, for two-thirds of said mine for a period the lease will show; whereas said Peters, Sloan & Co. worked the said mine for some years or two, and paid $\frac{1}{3}$ of the $\frac{2}{3}$ of all the gold extracted whilst they worked the mine to said Lewis A. Beckham for himself, and as trustee aforesaid;

Whereas Peters, Sloan & Co. sold their interest in said mine for $82,333.33; whereas Lewis A. Beckham sold his interest in said mine for $21,333.33, & his interest as trustee aforesaid for the same sum;

Whereas Col. Cad. Jones of Hillsboro', as trustee, claiming the one-third of said mine as trustee for Allen J. Davie, wife and children, as he alleges under a deed from William F. Davie; whereas James Sloan, one of the firm of Peters, Sloan & Co., collected for Lewis A. Beckham his part and the part of Julia Bedon, to wit, $41,666.66;

Whereas it is the wish of all the parties for the said several parties to receive the said several purchases without prejudice to the legal or equitable claim of Col. Cad. Jones:

It is agreed that whatever claim the said Cad. Jones had in said gold mine he shall have against the several parties who have sold and
179 received the purchase money instead of the land itself. And the said Lewis A. Beckham hereby agrees to acknowledge service of any bill in equity which the said Cad. Jones and his cestue que trust may in equity file against himself or against himself and others in Guilford County, North Carolina, waiving all questions as to jurisdiction, to settle any and all questions of title and right the said Cad. Jones, trustee, or his cestue que trust have or may have for the said purchase money, or the rents and profits received whilst he had anything to do with the said mines.

April 28th, 1854.

(Signed) L. A. BECKHAM.

Agreement of counsel on both sides.

We agree that in the town of Greensboro', on Friday & Saturday, the 11th & 12th June next, that the complainants & defendants may take the depositions of such persons as they may desire in the suit pending in the court of equity of the United States circuit court for western district of North Carolina, at Greensboro', where W. R. Davie & others are complainants, and M. L. Holmes & others are defendants, without further notice.

McCORKLE & BAILEY,
Sol'rs for Defendants.
DILLARD & GILMER,
For Plaintiffs.

180 The following is a copy of the lease by F. W. Davie to Charles McCulloch.

A.

STATE OF SOUTH CAROLINA,
Chester District:

Know all men by these presents that I, F. W. Davie, have leased to Charles McCulloch my gold mine in the county of Guilford, State of North Carolina, on the following terms: He is to assort the ores before grinding, all that yield three dollars per bushel pay one-half; all that yield two dollars per bushel shall pay one-third; all under two dollars ($2.00) one-fourth. The said Charles McCulloch agrees and contracts to work fourteen men on said mine, and when he does not, it shall operate as a termination of the lease, and the said lease to hold for twenty years.

F. W. DAVIE. [SEAL.]

Nov. 1st, 1830.

Witness:
JAS. L. ROSS.
JNO. B. KINGSBURY.

August term, 1833.

STATE OF NORTH CAROLINA,
Guilford County:

John B. Kingsbury proves the execution of the within lease in open court.

Ordered to be registered.

A. E. HANNER,
C. C. C.,
By O. S. HANNER,
D. C.

181 STATE OF NORTH CAROLINA,
Guilford County:

I, Will U. Steiner, register of deeds, and ex-officio clerk of the board of commissioners of said county, do hereby certify that the within and foregoing lease from F. W. Davie to Charles McCulloch is a true copy of the record, as found recorded in my office in Book "U," page 212. In witness whereof I have hereunto set my hand and affixed the seal of the said board of commissioners, at office in Greensboro', on this 11th day of June, A. D. 1875.

[SEAL.] WILL U. STEINER,
Register of Deeds & ex-offio Clerk, &c.

The following is a copy of the depositions of Moses L. Holmes, Reuben J. Holmes, James Sloan, and Will U. Steiner, as taken by J. W. Payne, as examiner and master in chancery, on the 11th day of June, 1875:

UNITED STATES OF AMERICA:

In the circuit court of the United States for the western district of North Carolina. In equity. At Greensboro'.

Pursuant to an order made in the suit now depending in the
182 circuit court of the United States for the western district of North Carolina, at Greensboro', in equity, wherein William Richardson Davie and others are complainants, and B. F. Briggs and others are defendants, appointing me a master in chancery and examiner in said cause, and to the agreement of counsel, hereto attached, I proceeded, at my office in Greensboro', on the 11th day of June, A. D. 1875, to take the depositions of Moses L. Holmes, Reuben J. Holmes, James Sloan, and W. U. Steiner, on behalf of the defendants Moses L. Holmes and Reuben J. Holmes, the plaintiffs and defendants being represented by counsel.

Deposition of M. L. Holmes.

MOSES L. HOLMES being duly sworn upon the Holy Evangelist of Almighty God to speak the truth, the whole truth, and nothing but the truth touching the matters in controversy between the parties, deposes and says as follows:

1st interrogatory by defendants, M. L. & R. J. Holmes. Are you one of the defendants in this cause?

Answer. I am.

2nd int. Where do you now live, and how long have you lived there?

Answer. I reside in Salisbury, N. C., and have resided there since Oct., 1865.

3rd int. Where did you reside prior to that time?

Answer. I resided at Gold Hill, N. C., from 1845 until Oct.,
183 1865. Gold Hill is situate 14 miles south of Salisbury, N. C.

4th. int. Do you know the premises in controversy, and did you visit them; if yes, how often and when?

Answer. I know them. I visited them while I was living at Gold Hill, and while I was part owner of them. I visited them once a month at times. Some times I was not there once in three months; not oftener.

5th. int. Was there any railroad communication at any time you visited them; and if not, state how you visited them and where they are situated?

Answer. There was no railroad communication to the premises, or in this part of the country. I always visited the premises by private conveyance. They are situated about 50 miles from Gold Hill. Premises situated about two miles south of Jamestown, Guilford Co.; the whole way was through the country; we passed no towns.

6th int. State whether at any time during your ownership of the mines you ever heard of any claim being set up to them, or any interest in them, by the plaintiffs or any of them, or by the def'ts (other than the def'ts Briggs, Peters, yourself or R. J. Holmes & Sloan) or any of them, or of any person under whom any of them claim?

Answer. I never did.

184 Cross-examined by pl'ffs.

1st. question. What interest did you have in the lands in controversy; from whom did you get it; what did you pay for it; were you sole owner or in connection with others?

Answer. At the start I and def't, R. J. Holmes, owned one-half of a lease of two-thirds of the property. At that time John Peters owned the other half of the lease. Afterwards Peters, Sloan, def't, R. J. Holmes & myself purchased the remaining third of John Gluyas. Afterwards, by an arrangement between ourselves, Sloan became the owner of one-third of the whole property; Peters one-third, and def't, R. J. Holmes and myself one-third between us. We paid nine hundred dollars for the lease, and took it subject to the terms of the lease. We operated the mine in conjunction with Gluyas, until we purchased his third. I do not recollect the exact sum paid. I think it was about $5,750. The deed will show.

2nd question. Who owned the two-thirds covered by the lease?

Answer. The lease was made by Lewis A. Beckham, in his own right, as I recollect, and as trustee of M'r's Julia Bedon; the lease will show. It was made to B. F. Briggs.

3rd question. Did you not know, or had you not heard at the
185 time you became one of the lessees of that mine, of any claim on the part of Allen Jones Davie on behalf of his family, or for Cad. Jones, as trustee for them?

Answer. I never heard anything of the claim until the papers in this suit were served on me.

4th question. Did you ever know of a man by the name of Charles McCulloch ever living on and working the mine in connection with Allen Jones Davie?

Answer. I never did. All that I ever knew was that the mine was known as the McCulloch mine.

5 question. Did Allen Jones Davie ever reside on the premises, to your knowledge?

Answer. I do not know that he ever resided on the premises spoken of.

6th question. How long did you keep the premises before you sold them?

Answer. Between two & three years; papers will show.

7th question. To what extent & of what values did you raise ores during the time elapsing before you sold the mine?

(Question objected to.)

Answer. I cannot say. M'r Sloan was the managing financial agent, he knows, perhaps.

Question. To whom did you sell; who made the sale, & when & on what terms?

Answer. M'r Sloan made the sale; but all the parties were con-
186 sulted. I think the sale was in 1853; but cannot distinctly recollect. The price was one hundred and twenty-five thousand dollars, & as to the terms, I do not now certainly recollect, but it was partly for cash & partly on credit. The sale was to Smith & Colby, I think.

Question. Was all the purchase money paid & deed executed, & to whom, & by whom?

Answer. The purchase-money was all paid, and a deed executed to the Belmont Company by James Sloan, R. J. Holmes, John Peters, and by affiant, as to one-third, and by Lewis A. Beckham for himself, and as trustee for M'r's Bedon, as to two-thirds; the deed will show.

Question. To whom was the money paid.

Answer. I cannot answer; the money was paid to Sloan.

Question. How much of the purchase-money was paid to Lewis A. Beckham?

Answer. One-third was paid him, as I think.

Question. What became of the other two-thirds of the money?

Answer. It was divided between Peters, Sloan, myself, & brother.

Question. When you went to make the deed, was not something said about the interest of Allen Jones Davie, or a claim for him?

Answer. No to my knowledge; nor had I heard of it.

Red.:

State whether or not any of the papers, touching which you have been examined to-day, have been seen by you lately?

187 Answer. They have not, & my answers are given from memory. And further this deponent saith not.

M. L. HOLMES.

Dep. of R. J. Holmes.

Next comes REUBEN J. HOLMES, who being duly sworn, it is agreed may answer touching the matters embraced in M. L. Holmes' deposition under a general question, instead of by repeating the interrogatories.

Question. Were you present at the taking of Moses L. Holmes' deposition, & have you heard the several questions propounded & his answers thereto, and if you can state whether his answers are true as therein stated, or otherwise?

Answer. I have heard his answer to each question & have deliberately considered thereof, & I answer that they are true, & I here adopt them as my own answers.

And further this deponent saith not.

REUBEN J. HOLMES.

Dep. of J. Sloan.

Next comes JAMES SLOAN, who being duly sworn, deposeth as follows:

Question. Are you a party to this cause; if yes, state how far from the premises you live & how long?

Answer. I am a party to the cause; I live 10 or 12 miles from the premises, & in Greensboro, & I have for fifty years lived in Greensboro.

Question 2. State whether or not you ever heard of any claim being set up to the premises by the plaintiffs or the defendants, other
188 than yourself, John Peters, M. L. & R. J. Holmes, or either of any of them, or of any person under whom they claim?

Answer. Never heard of any until this suit.

Cross-examination:

When you sold the mine, to whom did you sell, & at what price?

Answer. To Smith & Colby, & at ($125,000) one hundred & twenty-five thousand dollars.

Question. Did you not, at any time, know of a claim set up to one-third of the mine & premises by or on account of Allen Jones Davie, or his family, or both, or Cad'r Jones as a trustee for them during the of sale, or before the money was paid or deed executed?

Answer. I never did, according to my best recollection.

And further this deponent saith not.

JAMES SLOAN.

Dep. of W. U. Steiner.

Next comes W. U. STEINER, who being duly sworn, deposeth as follows:

Question. What office do you hold in Guilford County?

Answer. I am the register of deeds.

Question 2. Look at the paper writing hereto annexed marked "A," & state whether it is a true copy from the registry for the county of Guilford.

Answer. It is.

And further this deponent saith not.

WILL U. STEINER.

The foregoing depositions of M. L. Holmes, R. J. Holmes, James Sloan, & W. U. Steiner were sworn & subscribed before me at the day & place named in the caption.

JNO. W. PAYNE,
Master in Chancery & Examiner.

189 *Admitted facts.*

U. S. cir. c't, west'n dist. N. C. Greensboro, N. C. Special term, 1875.

WILLIAM R. DAVIE ET AL.
vs.
JAMES SLOAN, M. L. HOLMES, ET AL.

MEMORANDA.

The following facts in relation to the family of Allen Jones Davie are admitted:

1. That Rosa L. Davie, wife of Allen Jones Davie, died 23 September,

1843, leaving her husband and children mentioned in the bill surviving her.

2. That the time of the death of Allen Jones Davie is not known, but his death is supposed to have happened late in the fall of 1851, say 1 December, since which time he has not been heard from.

3. That Allen Jones Davie (son of Allen Jones Dave just mentioned), a citizen of Oregon, was born in 1825, and has not resided in the State for at least 30 years last past.

4. That William Richardson Davie (son of Allen Jones Davie) died in January, 1854, and was at the time of his death a citizen of Alabama, and had not resided in this State for at least 16 years before his death.

That the complainant, William Richardson Davie, born 15th June, 1843, Mary Fraser Woolf, born 15th September, 1845, John McKenzie Davie, born 24 October, 1847, and Allen Jones Davie, born 31
190 July, 1850, citizens of Texas, are his only surviving children and heirs at law, and have never resided in this State.

5. That M'r's Sally Jones Burton (daughter of Allen Jones Davie and Rosa L., his wife), born in 1825, a citizen of Kentucky, was married to her present husband prior to 1854, and has not resided in this State for at least 30 years.

6. That M'r's Rosa B. McKenzie (daughter of Allen Jones Davie and Rosa L., his wife), born 11 October, 1828, a citizen of Kentucky, was married in 1856, and left a widow in 1861, and has not resided in this State for at least 30 years.

7. That M'r's Julia Evans (daughter of Allen Jones Davie and Rosa L., his wife), born 12 September, 1831, a citizen of Kentucky, was married in 1866, and left a widow in 1870, and has not resided in this State for at least 30 years.

8. That M'r's Octavia Huggins (daughter of Allen Jones Davie and Rosa L., his wife), born 2 July, 1835, a citizen of Kentucky, was married in 1854, and left a widow in 1868, and has not resided in this State for at least 30 years.

9. That M'r's Mary F. McCrady (daughter of Allen Jones Davie and Rosa, his wife, born 11 August, 1840, a citizen of South Carolina, was married to her present husband 23 February, 1863, and has not resided in this State for at least 30 years.

10. That Thomas W. Davie (son of Allen Jones Davie and Rosa L., his wife), born 7 May, 1842, a citizen of Kentucky, has never resided in this State.

191 The following is a copy of the will of Hyder A. Davie:

SOUTH CAROLINA:

This is the last will and testament of Hyder A. Davie.

I devise and bequeath my whole estate, real and personal, to F. W. Davie, Lewis A. Beckham, and W. F. Desausarx, in trust for the sole and separate use of my daughter Julia Bedon, free from the debts, contracts, and control of her husband, and at her death in trust for child or children who shall be living at the time of her death; provided that if any of her children shall have died during her life leaving children who shall be alive at the death of the said Julia, such children shall represent their parents, and take the share such parents would have been entitled to if living at her death. If it shall become expedient to change the investment of any portion of my property, such change may be effected with the consent of my trustees, or a majority of them, at the

request of my daughter; but the substituted property shall be, and the same is hereby, settled to the same uses as attached under this will to the property sold. It is my will and desire that my negroes shall not be removed from the district of Chester, in this State. I constitute the before-named trustees executors of my will.

In witness whereof I have hereunto set my hand and seal this 25th March, 1847.

HYDER A. DAVIE. [SEAL.]

192 Signed, sealed, and published by the testator in our presence as his last will and testament, and we, in his presence and in presence of each other, have subscribed our names as witnesses, at his request.

JAMES BOATWRIGHT.
ROBERT W. GIBBS.
HENRY D. BULL.

In the court of ordinary, Jan'y 27th, 1848.

SOUTH CAROLINA,
Chester District:

Personally came into open court Henry D. Bull, who, being duly sworn, saith, upon oath, that he was present and saw Hyder A. Davie sign, seal, publish, pronounce, and declare the within writing to be and contain his, the said Hyder A. Davie's, last will and testament; and further saith the said Hyder A. Davie was then of sound, disposing mind, memory, and understanding to the best of this deponent's knowledge and belief; and further saith that he, this deponent, with James Boatwright and Robert W. Gibbs, in the presence of each other, did subscribe their names as witnesses thereto, in the presence of the testator and at his request.

HENRY D. BULL.

Sworn to and signed date above.
[SEAL.] PETER WYLIE, *Ord'y.*

In the probate court.

SOUTH CAROLINA,
Chester County:

193 I do hereby certify that the foregoing is a true and perfect copy of the original last will and testament of Hyder A. Davie, now on file in this office.

Given under my hand and seal of office, at office in Chester, the 13th day of May, A. D. 1875, and in the 99th year of American Independence.

[SEAL.] S. J. COUCH,
C. P. C.

194 THE UNITED STATES OF AMERICA:

Fourth circuit. The western district of North Carolina. In equity.

WILLIAM R. DAVIE ET AL.
vs.
B. F. BRIGGS, JA'S SLOAN, MOSES L. HOLMES, et al.

On motion of the complainants' solicitors in this case, it is ordered that

the complainants do have leave to amend their bill of complaint by substituting for the paragraph in the said bill marked "X X" the following, that is to say:

XX. That as your orators and oratrixes have been recently informed and believe the said Lewis A. Beckham, John Peters, James Sloan, Moses L. Holmes, and Reuben J. Holmes thus having entered into possession of the said lands and gold mines thereon as cotenants with the said Cadwallader Jones, trustee, and his cestui que trust, and having worked the same as copartners therein until the said Cadwallader Jones, trustee, and his cestui que trust entered into a contract of sale of the said lands and mines thereon to a com-
195 pany known as the Belmont Mining Company, but whether the said company was incorporated your orators are not informed and have not been able to learn. That upon learning thereof your orators and oratrixes, Trustee Cadwallader Jones, notified all the parties to the said contract of his right and title to the same as trustee aforesaid, and that thereupon the said Lewis A. Beckham, John Peters, James Sloan, Moses L. Holmes, and Reuben J. Holmes entered into an agreement in writing, which agreement recited the receipt of Peters, Sloan & Co. of eighty-two thousand three hundred and thirty-three dollars and thirty-three cents ($82,333.33) as their share of the proceeds of the said sale, and the receipt of Lewis A. Beckham for himself an' as trustee for M'r's Julia Beden of the sum of forty-three thousand six hundred and sixty-six dollars and sixty-six cents ($43,666.66), and also recited the claim of the said Cadwallader Jones, of which they had been notified, and recited further that it was the wish of all the parties to receive their said several shares without prejudice to the legal
196 or equitable claim of the said Cadwallader Jones, and that whatever claim the said Cadwallader Jones had in the said gold mine he should have against the several parties who sold and received the purchase money, instead of the land itself.

That the said John Peters, James Sloan, Moses L. Holmes, and Reuben J. Holmes were the persons intended to be named as Peters, Sloan & Co., and that the said John Peters, James Sloan, Moses L. Holmes, and Rueben J. Holmes, together with Lewis A. Beckham, thereupon received and took the purchase-money, to wit, the sum of one hundred and twenty-five thousand dollars, the proceeds of the said sale, and thereupon undertook and agreed to hold, and did hold, and do now hold, the said money, the proceeds of the said sale of the said lands and mines upon the trusts mentioned in the said deed from the said Frederick W. Davie to the said Cadwallader Jones. That the said Lewis A. Beckham and John O. Peters as your orators and oratrixes are informed and believe have both departed this life, and that their estates are respectively insolvent.

197 *Order for leave to amend.*

WILLIAM R. DAVIE ET AL
vs.
B. F. BRIGGS, JAMES SLOAN, MOSES L. HOLMES ET AL.

The complainants have leave to amend their bill by filing this amendment, and the defendants are allowed further time to answer until the tenth day of January, 1875, next.

HUGH L. BOND,
C't Judge.

Filed Oct. 15th, 1874.

JNO. W. PAYNE, *C e*

We accept service of a copy of this order and amendment Oct. 14, 1874.

McCORKLE AND BAILEY,
Atto's for M. L. Holmes & R. J. Holmes.

198 By agreement of counsel and the written consent of the Hon. Hugh L. Bond, circuit judge of the fourth circuit of the circuit court of the United States of America, the cause having been heretofore set down for hearing, the same was heard, as per agreement, before the Hon. Rob't P. Dick, judge, September the , 1875.

Arguments were delivered and briefs filed.

Whereupon the court reserved its opinion until the regular term of the circuit court of the United States, the second Monday in October, A. D. 1875, at which time the court, the Hon. Rob't P. Dick, judge, present and presiding, delivered the following opinion, to wit:

199 *Opinion of Robert P. Dick, judge.*

UNITED STATES OF AMERICA:

Western district of North Carolina. In the circuit court. In equity.

W. R. DAVIE ET AL.
vs.
B. F. BRIGGS ET AL.

The full and well digested briefs filed by counsel make it unnecessary for me to refer particularly to the evidence and authorities relied on in the argument, and which are material in the decision of this case.

The plaintiffs are the heirs at law of Allen J. Davie, dec'd, and the equities which they seek to enforce are dependent upon a deed in trust, which is alleged to have been executed in January, 1833, by F. W. Davie to Cad. Jones, s'r, trustee, for the benefit of Allen J. Davie and wife for their lives, with remainder to their heirs at law.

It is further alleged that this deed in trust was duly executed,
200 but was lost before it was admitted to registration, and cannot now be found after a diligent search has been made. A written instrument is introduced by the plaintiffs in evidence which they allege is a correct copy of said deed in trust, and proofs are offered to sustain this allegation, as the defendants who have answered deny all knowledge of said deed, and require strict proof of the same. The loss of this deed in trust by accident before registration would not deprive the plaintiffs of the rights conferred by said deed if they had sought the relief of a court of equity in apt time, and were able to establish by competent and satisfactory proofs, showing that said deed was duly executed and was lost by accident before registration, and that the written instrument offered in evidence is a correct copy of the original deed.

I have carefully examined the proofs upon these points, after hearing able and elaborate arguments, and have arrived at the following conclusions upon this part of the case:

1st. I am of the opinion that the written instrument is a cor-
201 rect copy of an original instrument signed and sealed by F. W. Davie in the presence of H'y A. Davie, a subscribing witness, on the 15th day of January, 1833.

2d. The proofs do not satisfy me that this original instrument was ever delivered to the trustee or cestui que trust by F. W. Davie to have operation as his act and deed.

Upon the question of delivery, the plaintiffs present the following proofs and arguments, which I regard as material upon this point:

1st. The attestation clause in the copy introduced, which is shown to be a correct copy, states that the deed was "signed, sealed, and delivered in the presence of H. A. Davie," and it was further shown that the original instrument was in the handwriting of F. W. Davie, and the signatures of the grantor and subscribing witness were genuine.

2d. Col. Cad Jones, jr, in his deposition, says, "My impression is that I saw the deed in the possession of Allen Jones Davie when he lived in Hillsboro, N. C., and that I read it, but cannot speak of its contents."

202 3d. Allen Jones Davie and his family, on or near the land conveyed from 1831 to the fall of 1833, and exercised rights of ownership, and it was generally understood at that time in that neighborhood that he had a third interest in the property.

4th. In the fall of 1833, Allen Jones Davie instituted a suit in the court of equity for Guilford County, to inforce his rights in the property, and prosecuted said suit until 1841, when it was dismissed in the supreme court of the State, "without prejudice to the plaintiff's right to file another bill."

5th. That Allen Jones Davie discovered the value of the land and induced F. W. Davie to purchase the same; and after the purchase spent much time and labor in exploring and developing the property; and it is insisted that these services and expenses constituted the real consideration of the said deed in trust, and induced its execution.

6th. The plaintiffs in argument insist that when a deed is offered in evidence, which appears on its face to be duly executed, and

203 when it is shown that the grantor and subscribing witness are both dead, and their signatures are genuine; and when it is further shown that said deed had been in the custody of the grantee, or a person claiming under him after the date of its execution, and the grantee or person claiming under him had also been in the possession of the land conveyed by said deed, and exercised the rights of ownership, the law will presume that said deed was duly delivered, and that this legal presumption is so strong that it cannot be rebutted, except by clear and positive proof that the said deed was not delivered.

7th. The plaintiffs further insist, that as it is shown that the lost deed under which they claim is more than thirty years old, the rules of evidence as to its due execution are less stringent than in the case of a deed of less age, and they are only required to show their custody of the deed, its legal operation and possession under it, to raise the legal presumption of delivery.

The defendants, Reuben J. Holmes and Moses L. Holmes, in

204 their answer, deny all knowledge of said deed and the claims of the plaintiff's until some time after the sale of their interest in the lands in controversy to the Belmont Mining Co., in June, 1853.

They insist in argument that where rights are claimed under a lost and unregistered deed, the strictest proof as to its complete execution is always required by a court of equity. That material things in such a case are never presumed, and if not fully proved are considered as never having existed. That where such material things might have been proved, if due diligence had been used in apt time, all presumptions are against the claimants, and these adverse presumptions are

greatly strengthened when the claimants have delayed the assertion of their alleged rights until the parties and witnesses to the alleged transaction are all dead.

It is further insisted on the part of the said defendants, that the following facts and circumstances developed in the pleadings and proofs tend to show that the alleged lost deed was never duly delivered by the maker.

205 1st. No sufficient reason is assigned or proof offered to account for the non-probate and registration of the alleged deed. The trustee and cestui que trust resided in the State, and were very convenient to the proper place of registration. The property alleged to be conveyed was regarded very valuable by the primary cestui que trust, Allen J. Davie, and he had a strong motive for having his title perfected by the registration of the alleged deed. That deeds nearly cotemporaneous for interests in the same land made by the grantor, F. W. Davie, to McCulloch and H'y A. Davie, were duly registered soon after execution.

That the following condition is annexed to the copy of the alleged deed:

"Having advanced to A. J. Davie four hundred and fifty-nine dollars, I do also make the above conveyance answerable to the above demand.

"F. W. DAVIE. [L. S.]

"H'Y A. DAVIE.
"ALEX'R CRAWFORD."

This condition must have been annexed at a time subsequent to the making of the deed, as it has an additional subscribing witness,

206 and this demand could have been appropriately included with other similar charges in the deed, and this circumstance tends to show that the maker had possession of the deed subsequent to its date and held the same as a security for his debts, and no proof has been offered that the incumbrance was ever removed by the discharge of the debts.

3d. That in a few months after the date of the said deed a suit in equity was commenced by Allen J. Davie vs. McCulloch, who claimed under W. F. Davie, and the title of Allen J. Davie was involved in the controversy, and this suit was pending in court for more than seven years, and was dismissed because the said deed was not produced by Allen J. Davie under a rule of the supreme court requiring its production. This suit was dismissed "without prejudice to the plaintiff's right to file another bill," and yet no new suit was commenced by said Allen J. Davie, and there is no proof that he ever in any way asserted his rights under said deed, although he lived for ten years afterwards.

207 4th. That Col. Cad. Jones, s'r, the alleged trustee, lived within sixty miles of the land, and was required by law, if he had accepted the trust, to protect and secure the rights and interests of his cestui que trust; and yet he never took any steps in the matter until the fall of 1853, a period of more than twenty years after the date of said deed in trust. At that time he employed counsel who fully investigated and became familiar with the condition of things and the alleged rights of the cestui que trust; and yet no suit or other proceedings were ever instituted to enforce the said alleged rights, although the trustee lived seven year' afterwards.

5th. The plaintiffs did not commence their proceedings until after the death of L. A. Beckham, a subsequent grantee of the land they claim,

and other important witnesses who could have proved the truth of the transactions relating to the matters now in controversy.

6th. There is no evidence of the custody of the alleged deed until after the death of the grantor and subscribing witness, except the
208 indefinite and unsatisfactory testimony of Col. Cad. Jones, j'r; and there was no effort made to have the deed proved and registered during the lives of the grantor and subscribing witness, although both of them lived for more than fifteen years after the date of the deed.

7th. That the alleged grantees never had actual possession under the deed of the land alleged to be conveyed; and the effort made by A. J. Davie to obtain possession was unsuccessful because he could not produce said deed when required to do so under rule of court.

8th. That the alleged grantor, F. W. Davie, on the 2d of March, 1850, executed two deeds to L. A. Beckham—one conveying a third interest in said land to the grantee, for the consideration of two thousand dollars; the other to him as trustee for M'r's Beden, the only child H'y A. Davie, dec'd; which said deeds, together with the deed executed on the 1st January, 1831, by F. W. Davie to Charles McCulloch, for one-third interest, embraced the entire title to said land; and all of said deeds were duly admitted to probate and registration in the proper office.

209 10th. The defendants' counsel, in argument, insist that none of the presumptions of law as to the due execution of ancient deeds can have effect in this case, as they apply only where the original deed is produced, and where the grantee or persons claiming under him have had the custody of the deed and a continuous possession of the land alleged to be conveyed.

11th. That the lapse of time from the date of the deed until the commencement of this suit raises strong presumptions against the plaintiffs. In the language of Chief Justice Ruffin, in Plummer vs. Barksdale (1 Ird. E., 270), "The presumption from lapse of time is, then, really against the plaintiffs, because, in the nature of things, the truth is likely to be obscured, the facts forgotten, and material witnesses dead, and the court, misled by specious appearances, all in proportion to the longer or shorter time intervening between the happening of a transaction and the investigation of its existence and consideration and purpose. As the plaintiffs come late to establish their case, it may be true
210 that they cannot do it as clearly as they once could. That is their misfortune. But still the court must have proper and full proof, such as will produce the conviction that, long ago as it is said this deed was executed, yet in fact it was then executed and was an absolute conveyance."

I have thus far stated the facts shown in evidence which I regard as material upon the question under consideration. I have also stated, in my own language, the arguments of counsel as made in their briefs and orally at the hearing, and such as may be deduced from the authorities cited. I will now proceed to give my opinion upon the material facts proved and the questions of law presented for determination. It appearing, in evidence, that the grantor and subscribing witness are both dead, I am of the opinion that the plaintiffs in showing that the signatures to the original instrument were genuine would have furnished prima facie evidence of its delivery if they could have further shown that it was in the custody of the grantee, or under his control,
211 during the life of the grantor. Col. Cad. Jones, j'r, the only witness who testifies as to the existence of the deed and of its custody prior to the death of the grantor, does not speak positively on the

subject. He has an impression that he saw the deed in the custody of Allen J. Davie while he lived at Hillsboro', and that he read it, but cannot give its contents. He does not prove the signature to the deed so as to identify it with the instrument under which the plaintiffs claim.

Col. Cad. Jones, sen., was the proper person to have the custody of the deed, as he was the appointed trustee, and if he accepted the trust it was necessary that he should have the custody of an unregistered deed, so as to know his duties and responsibilities, and be able to protect and secure the rights his cestui que trust. If, however, it had been shown that the deed was in the continuous custody of the cestui que trust up to the death of the grantor, such evidence would be sufficient upon this point. But I think the plaintiffs fail in furnishing such evidence, and the proofs in the cause raise contrary and strong presumptions against the existence of such fact.

212 The suit in equity commenced by Allen J. Davie in the fall of 1833 was pending in court until 1841, and was then dismissed because the deed was not produced in obedience to a rule of court. Why was the deed not produced? In response to this inquiry I can form but one reasonable conjecture, and that is he did not have the deed in his possession or under his control. This conjecture is strengthened by the fact that appears in the transcript of the case, that in 1835 W. F. Davie is made a party defendant, and an order obtained to take his answer. Why should he have been made a party defendant, if he had executed the said deed? He had executed two deeds in 1831 to McCulloch and H'y A. Davie, for two-thirds of the land, and if he had executed the alleged deed to Col. Cad. Jones, sen., in 1833, for the other third, then he had no interest in the matter and would not be a necessary party. If the alleged deed was not executed according to the understanding between Allen Jones Davie and W. F. Davie, founded upon a

213 valuable consideration, then he might be a necessary party for the purpose of specific performance.

In the argument, the equity suit referred to was considered as an effort on the part of the plaintiffs to enforce their rights under the alleged deed, and it was conceded that the defendant, W. F. Davie, was the same person as F. W. Davie, the maker of said deed. The original papers in this suit are lost, and we cannot ascertain the purposes of said suit and the names of the parties, only so far as they are disclosed by the brief entries on the evidently imperfect transcript of record offered in evidence. If the purpose of the suit was to secure and protect the rights of the cestui que trust under the alleged deed, and to compel the lessee, Charles McCulloch, to pay rent to them under their title acquired subsequent to the commencement of said lease, then the trustee was the only necessary party plaintiff, as he represented the persons beneficially interested; and yet his name does not appear of record. The fact appearing of record that Allen J. Davie and others are the

214 plaintiffs, and McCulloch and W. F. Davie the defendants, induces me to believe that the suit was not founded upon an executed deed, but was brought to enforce some alleged equity which the plaintiffs supposed they had in the land which was not secured by a proper conveyance. At the commencement of this suit the plaintiffs, Allen J. Davie and others, obtained an interlocutory injunction against McCulloch, and in the progress of the suit the injunction was dissolved, and the clerk was ordered to ascertain and report the damages sustained by the defendants by reason of said injunction.

It would seem, therefore, that the plaintiffs could not show sufficient

legal or equitable rights to entitle them to this injunction relief of a court of equity.

There is another circumstance that strikes me with some force. If Allen J. Davie had the deed in his possession, as shown by Cad. Jones, j'r, and did not produce it, every presumption to his disadvantage is to be taken against him. He must have also been advised that while his unregistered deed operated in conveying title it could not be
215 shown in evidence in a suit until registered, and yet no registration was ever effected.

The plaintiffs further say that the deed under which they claim is more than thirty years old, and in such a case proof of execution is dispensed with, and the law presumes that the deed was duly signed, sealed, and delivered. I am inclined to think that this rule of law only applies in cases where the original deed is produced, but in all cases where this presumption is effectual a continuous possession of the land conveyed, and a proper custody of the deed, must be shown by the person claiming under such deed.

We have already considered the evidence as to the custody of the alleged deed, and we will now briefly refer to the evidence upon the question of possession of the land after execution of deed.

There is some evidence that Allen J. Davie had some control over the property in 1833, and the deed is alleged to have been executed on the 15th of Jan'y, 1833. It appears that on the 31st of November, 1830, F. W. Davie leased the entire property to Charles McCulloch for the term of twenty years. It is a rule of law that a tenant cannot
216 dispute his landlord's title, and the possession of a tenant for a term of years is the possession of the owner in fee. But where the owner of the fee claims under a deed from the original landlord of a date subsequent to the date of the lease, and relies upon the possession of the tenant as a presumption of his title, he must show that the tenant in some way recognized the existence of his paramount estate.

It appears from the equity suit above referred to that the tenant, McCulloch, held adversely to Allen J. Davie, and would not recognize him as landlord; and the purpose of the suit was to compel such recognition and payment of rent, and the suit failed because no paramount title was shown by Allen J. Davie. From the facts proved there is a reasonable presumption that if Allen J. Davie had any possession of the property after the 31st of November, 1830, the date of the twenty years' lease to McCulloch, it was merely permissive and not of right, and was allowed because he had an expected or inchoate interest, which would afterwards be legally conveyed; and as no legal convey-
217 ance was made, the lessee in 1833 denied longer possession, which resulted in the suit in equity commenced by Allen J. Davie to have his contract with F. W. Davie specifically performed, and the proceeds of the mine protected by injunction until his rights were ascertained and determined. After the dismissal of said suit in equity in 1841, Allen J. Davie seems to have abandoned the property and made no further effort to regain possession or enforce payment of rent.

The defendants insist upon all the presumptions which arise in this case from lapse of time and the laches of the claimants. Upon this subject I am of opinion that where a deed is lost, and its due execution is denied, and this denial is sustained by corroborating circumstances, and the parties and witnesses who could have shown the truth of the transaction are all dead, and the grantee took no steps to complete his title, lapse of time and the laches of parties who claim under such deed ought to be considered of great weight by a court of chancery in deter-

218 mining the matter. The trustee and primary cestui que trust had ample time, opportunity, and power to have had their deed registered, and thus made the evidence of its execution certain and permanent; and as they failed to do so for such a long time, the present plaintiffs cannot reasonably expect a court of equity to enforce their alleged rights except upon positive, direct, and satisfactory testimony.

As the plaintiffs have failed in their proofs as to the delivery of their alleged deed, I need not refer to other circumstances relied upon by the defendants tending to show that there was no delivery.

The defendants are entitled on this point of the case to have the bill dismissed with costs, and there is no necessity for me to express an opinion upon other questions. But, as this is an important case, and my decision will probably be reviewed on appeal, I deem it proper to express my views on some other questions presented by the pleadings and urged in the argument.

We will now assume, for the sake of argument, that the plaintiffs have fully established their deed, and have not lost the right to enforce
219 their equities under it by inexcusable laches and lapse of time.

The defendants insist that they are purchasers for value, and are not subject to the equities claimed by the plaintiffs, who derive their title under a voluntary conveyance. I think the plaintiffs have shown a valuable consideration, but even if the deed was voluntary the defendants are subject to the equities conferred, if—

1st. They interfered with or appropriated any of those equities.

2d. If they purchased the property and disposed of it with notice of such subsisting equities.

The first question which we will consider is, how far have the Holmes defendants (for they are the parties against whom relief is sought) deprived the plaintiffs of their rights. On the 17th day of February, 1852, the Holmes' and others purchased one-third interest in said land from John Gluyas. The title to this interest is not denied, and is also shown to be complete, and this purchase in no way interfered with the rights of the plaintiffs. On the 3d of April, 1850, L. A. Beckham
220 leased two-thirds of said land to B. F. Briggs for a term of eight years. On the 12th of June, 1850, Briggs transferred his lease to the Holmes' and others, and they commenced working the mines in August, 1850, and continued operations until the 22d of June, 1853, when they conveyed the unexpired term of their lease to the Belmont Mining Co.

It is insisted by the plaintiffs that one-third of the property thus leased by Beckham belonged to them. Beckham had a deed for the land leased, executed by F. W. Davie on March 3d, 1850, which was duly proved and registered. In this connection, we will not consider the title of Beckham as trustee of M'r's Beden, as it is not in controversy in this suit. Beckham was a purchaser for the valuable consideration of two thousand dollars, and there is no evidence that he had notice of the prior unregistered deed of the plaintiffs. Even if he had notice, it would seem, from the doctrine laid down in the case of Flemming vs. Burgin, 2d Ird. Eq., 584, that a court of equity would not afford
221 relief to the plaintiffs unless the trustee had been prevented from registering his deed by the fraud of Beckham, the subsequent purchaser. At all events, it must be shown that Beckham had as complete a knowledge of the deed as could have been derived from the registry itself. (Adams' Eq., 154; Flemming vs. Burgin, supra.)

If, then, the title of Beckham was complete there is an end of this case, as those who claim under him are protected by his title. But

waiving this view of the case, there is no evidence showing that the Holmes defendants had actual notice of the claims of the plaintiffs, and not sufficient evidence to fix them with constructive notice prior to the sale of their lease to the Belmont Mining Co.

The evidence relied on to show constructive notice is as follows:

1st. The notoriety of A. J. Davies' interest, and his possession of the property.

This notoriety was confined to the neighborhood of the land and his possession was continued only a few years, and that twenty years before the sale. The defendants resided some distance off and deny all notice both in their answers and depositions, and even if upon en-
222 quiry they had heard of that reputed interest and temporary possession, the result of the subsequent equity suit and the abandonment of the property were well calculated to convince them that Allen J. Davie had no title.

2d. The clause in the deed of F. W. Davie to McCulloch conveying "my undivided third part," and also the fact that McCulloch conveyed to Gluyas by a quitclaim deed.

The title to this third part is not disputed. But suppose the defendants had been put upon enquiry by the discovery of these facts appearing in the chain of title, what would have been the result of their investigations? They would have found from the record of the court of equity, that Allen J. Davie could not show a deed to the land, and upon consulting the registry of deeds they would have found deeds to Beckham, covering the property, duly proved and registered, and no deed to Allen J. Davie.

3d. The pendency of the suit in equity. Lis pendens furnishes no notice of an unregistered deed. Ad. E., 154. A suit not prosecuted to decree is not constructive notice to a person who is not a pendente lite purchaser. (8 Crouch, 462.)

223 In any view of the case, when the bill was dismissed "without prejudice to the plaintiffs' right to file another bill," the lis pendens would only continue for such time as is allowed by law to commence another suit. I will not dwell longer upon this part of the case.

It appears that a written notice of the plaintiffs' claim, signed by Ralph Gorrell, esq., attorney of Cad. Jones, sen., and directed to the defendants, was found among the law papers of Hon. J. A. Gilmer, dec'd. This notice was dated about a month after the sale of the land to the Belmont Mining Co. It is further shown that Hon. J. A. Gilmer was at that time the attorney of the defendants, in effecting the sale of said property. Notice to an attorney is notice to the client of all matters he entrusts to his attorney. We conclude, therefore, that at that date the defendants had notice of the claim of plaintiffs. The defendants had ceased to work the mine and would not be responsible for rents and profits previously paid over to L. A. Beckham, but would be re-
224 sponsible for one-third of the value of the lease sold to the Belmont Mining Co., if the plaintiffs could establish their title, and had not lost their remedy by laches and lapse of time.

The defendants plead the statute of limitations in bar to the claim of the plaintiffs. If the statute barred the rights of the trustee to sue, it also bars the rights of the cestui que trust for whom he held the land. 6 Jones Eq., 328. We will now enquire into the merits of this defence.

If the alleged deed of the plaintiffs was valid, they were tenants in common with McCulloch and H'y A. Davie. The possession of one tenant in common is the possession of his co-tenants. The statute of limitations did not, therefore, begin to run until the purchase from F.

W. Davie by Beckham, who then held adversely to the plaintiffs. The statute did begin to run from that date and nothing could stop it, but the fraud or subsequent agreement of the adverse claimants. It is insisted that the operations of the statute was stopped by a subsequent agreement of the defendants, which converted them into actual trustees of an express trust for the plaintiffs, and that the statute
225 of limitations does not run in such cases. It is well settled that the statute of limitations does not apply to express trusts until the purposes of the trust are accomplished and the trustee has fufilled all his duties. In the case of a constructive trust the cestui que trust must seek his remedy in a reasonable time or he will be denied relief in a court of equity.

Let us then examine the nature and effect of the instrument offered in evidence signed by L. A. Beckham, acquiesced in by James Sloan, a partner of the Holmes' defendants in the sale of the lease, and accepted by Cad. Jones, j'r, the attorney of the trustee Cad. Jones, sen.

The Holmes' defendants insist that they are not bound by the implied contract of their former partner James Sloan, as 1st. The partnership had been closed and the assets duly distributed. 2d. The action of Sloan was not within the scope of the business and purposes of the partnership.

The view which I take of the agreement signed by Beckham
226 renders it unnecessary for me to decide the question as to the power of partners to bind each other by contracts. I think the agreement is not binding as to defendants, for the reason that it is not of mutual obligation. It does not operate by way of estoppel to secure the title of the Belmont Mining Co. against the claims of the plaintiffs. It was not made until after the sale to the Belmont Mining Co., and did not constitute an inducement to the said purchasers. The purpose of the agreement as construed by the plaintiffs was to convey or assure title to the Belmont Mining Co., and indemnify the defendants against the obligations of their warranty. The trustee by the express terms of the deed in trust could not sell the land except by the consent of Allen J. Davie or W. F. Davie. Without this consent he was bound to convey to the plaintiffs upon the death of Allen J. Davie and his wife. Therefore any other disposition of the land by the trustee would be inoperative, as it was a breach of trust of which the defendants had constructive notice.

It is insisted that the acceptance of the agreement by the trus-
227 tee raised an implied contract on his part not to contest the title of the Belmont Mining Co. If so, it was a contract relating to the title of land and is void under the statute of frauds. It cannot be construed as a declaration of trust, or as creating an implied trust not affected by the statute of frauds in this State. The agreement was made after the sale of the land, and no declaration of trust was made by the trustee. No trust can arise by implication from the circumstances of the transaction, as the defendants assumed no new obligation or in any way recognized the rights of the plaintiffs to the fund derived from the sale of the land. The defendants held these funds adversely as they formerly held the lands. They only agreed that if the plaintiffs could show in a court of equity that they were entitled to any relief against the defendants as the former holders of the land, the same relief should be had against them as the holders of the proceeds of the land.

From this construction of the agreement, I am of opinion that
228 it in no way suspended or stopped the operation of the statute of

limitations; and the plaintiffs come too late to enforce their rights, if they ever had any.

I cannot close this opinion without acknowledging my obligation to the counsel for their learned and able arguments, and full and elaborate briefs, which have rendered me so much assistance in determining the rights of the parties in this controversy.

Let a decree be drawn dismissing the bill, and directing the costs to be taxed against the plaintiffs.

DICK, *Judge.*

229 At which term the following decree was filed:

United States circuit court for W. D. of N. C., at Greensboro, October term, 1875.

W. R. DAVIE & OTHERS } *against* B. F. BRIGGS & OTHERS. } In equity.

This cause coming on for hearing upon the bill, answers, replications, exhibits and proofs, and the same being heard and debated by counsel, upon consideration thereof, it is ordered, adjudged and decreed by the court that the bill be dismissed with costs against complainants and their surety, to be taxed by the clerk.

Both plaintiffs and defendants being present in court, the plaintiffs prayed an appeal from aforesaid decree and judgment in open court, to the Supreme Court of the United States of America, which appeal was allowed by the court, and a transcript of the record is herewith sent.

I, John W. Payne, clerk of the circuit court of the United States
230 for the western district of North Carolina, at Greensboro, hereby certify that the foregoing is a true copy of the bill of complaint, exhibits, answers, and proofs in a cause lately pending in aforesaid circuit court, wherein W. R. Davie et al. were plaintiffs, and B. F. Briggs et al. were defendants.

Dec. 30th, 1875.

[SEAL.]

JNO. W. PAYNE,
Clerk Circuit Court of United States,
Western Dist. N. Carolina, at Greensboro.

(Indorsed:) W. R. Davie et al. against B. F. Briggs et al. Transcript of record.

(Indorsement on cover:) No. 345. William R. Davie, Mary F. Woolf & her husband, Stephen McP. Woolf, John McKenzie Davie et al., appellants, vs. B. F. Briggs, John O. Peters, James Sloan et a'. W. North Carolina. C. C. U. S. Filed 18th January, 1876.

SUPREME COURT

OF THE UNITED STATES.

WILLIAM R. DAVIE, MARY F. WOOLF, AND HER HUSBAND STEPHEN McP. WOOLF, JOHN M. DAVIE, ALLEN J. DAVIE, ET. AL.

vs.

B. F. BRIGGS, JOHN O. PETERS, JAMES SLOAN, M. L. HOLMES, R. J. HOLMES, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

ASSIGNMENT OF ERRORS

AND

ARGUMENT OF EDWARD McCRADY, JUN'R.

CHARLESTON, S. C.
WALKER, EVANS & COGSWELL, PRINTERS,
Nos 3 Broad and 109 East Bay Streets.
1878.

ASSIGNMENTS OF ERROR.

1. That his Honor erred in holding that the plaintiffs have failed in their proofs as to the delivery of the deed from F. W. Davie to Cadwallader Jones, trustee.

2. That his Honor erred in holding that there was no sufficient evidence of the custody of the deed by Cadwallader Jones, or his *cestuis que trust.*

3. That his Honor erred in holding that in all cases where the presumption from an ancient deed is effectual, a continuous possession of the land must be shown. 1

4. That his Honor erred in holding that it appears from the equity suit between Allen J. Davie and McCulloch, that McCulloch held adversely to A. J. Davie, and that the purpose of that suit was to compel McCulloch's recognition of A. J. Davie's title to the land, and that at the end of the suit A. J. Davie abandoned the property.

5. That his Honor erred in holding that relief is sought only against "the Holmes." Relief is sought against all the members of the firm of Peters, Sloan & Co., except Peters, who died insolvent, and as to whom the bill was dismissed, under 2 the 51st rule in equity, and in *DeWolf vs. Johnson, 10 Wheat., 367.*

6. That his Honor erred in holding that there is no sufficient evidence that the defendant, the Holmes, had actual or constructive notice of the plaintiffs rights.

7. That his Honor erred in holding that the defendants, Peters, Sloan & Co., were purchasers without notice of the plaintiffs' claim.

8. That his Honor erred in holding that the conveyance of one-third to L. A. Beckham, in trust for Mrs. Bedon, is 3 not in controversy, and that L. A. Beckham was a purchaser

as to the one-third conveyed to him in his own right for valuable consideration without notice.

9. That his Honor erred in holding that the agreement of the 28th April, 1854, entered into between the defendant, Sloan, who was a member, and "the financial agent" of the firm of Peters, Sloan & Co.; John A. Gilmer, who was their attorney; Lewis A. Beckham, and Cadwallader Jones, Jr., attorney for Cadwallader Jones, Sr., the trustee is not binding as to the defendants.

4 10. That his Honor erred in holding that if the statute barred the right of the trustee to sue, it also barred the right of the *cestui que trust*, for whom the trustee held the land. Whereas his Honor should have held that it only ran (if at all) against the *cestui que trust*, from the time when the right of action accrued to such *cestui que trust*.

11. That his Honor erred in holding that the agreement above mentioned in nowise suspended or stopped the operation of the Statute of Limitations, and that the plaintiffs come too late to enforce their rights.

5 12. That his Honor erred in fixing the date of the commencement of the running of the statute (if it ran at all), as of 2d March, 1850, and in holding that the appellants are barred thereby.

STATEMENT OF CASE.

Allen J. Davie, the grandfather of the first four named appellants, and father of the others, having discovered that the lands in question were valuable on account of the gold and other ore thereon, negotiated with the owner, John Teague, for the purchase, at the sum of $3,000, and thereupon in-
6 duced his brother, Frederick W. Davie, a person of means, to take the lands with him. Frederick W. Davie paid the purchase money and took the title in his name. Allen J. Davie was to have a one-third interest, in consideration of the transfer of the contract of purchase. (*Allegations of bill unanswered, p. 1, f. 3. Test. C. F. Mendenhall, p. 30, f. 68;*

p. 31, f. 70. Abel Gardner, p. 36, f. 81. S. G. Coffin, p. 36, f. 82. Cad Jones, p. 65, f. 153.)

The deed from John Teague to F. W. Davie, is dated 26th January, 1829. (*p. 8, f. 19.*) 7

F. W. Davie leased the mine to one Charles McCulloch on 1st November, 1830, for a term of twenty years, on condition that he should work a certain number of hands ; his failure to do which to operate as a termination of the lease. (*Lease, p. 75, f. 180.*)

Soon after the lease, to wit : 1st January, 1831, F. W. Davie sold and conveyed in fee to McCulloch, an interest in the lands, which he described as "*my* undivided third part," (*p. 43, f. 98.*)

The other third part, it is probable, as alleged in the bill, 8 it had been agreed should be conveyed to their brother, Hyder A. Davie, as we find that F. W. Davie did, on the 7th August, 1831, convey to him "*one* undivided third part, consideration, $3,000. (*p.* 8, f. 21.)

On the 15th January, 1833, F. W. Davie executed a conveyance of "*one* undivided third part" to Cadwallader Jones in trust, for Allen J. Davie, wife, and children. (p. 9, f. 22.)

Frederick W. Davie thus parted with all his interest in the property, and Charles McCulloch, Hyder A. Davie, and Allen J. Davie and his family, became owners as co-tenants, 9 each of one undivided third part—the legal title of Allen J. Davie's third being in Cadwallader Jones, in trust.

Soon after the purchase from Teague, that is, "about the years 1831–'2, Allen J. Davie took up his residence on the lands, lived there, and worked the mines, until a difficulty arose with McCulloch, who was also working them." (*Test. C. P. Mendenhall, p. 30, f. 68 ; Abel Gardner, p. 36, f. 81 ; Dr. Coffin, p. 37, f. 83.*)

A long litigation ensued between Allen J. Davie and McCulloch (*p. 56, f. 132*), which was ended by the dismissal of 10 the bill, *without prejudice*, to the filing of another (*p. 59, f. 138.*) This litigation was a matter of general notoriety. (*Test. C. P. Mendenhall, p. 31, f. 69 ; Dr. Coffin, p. 37, f. 83.*)

The working of the mines was thereupon abandoned by both parties, (*Test. Dr. Coffin, p. 37, f. 83,*) and as we have

seen the lease to McCulloch, by its terms, thereupon terminated. (*P. 75, f. 180.*)

On the 8th January, 1848, McCulloch conveyed his in-
11 terest by a deed of *quit claim* to one John Gluyas, (*p. 44, f. 101-2,*) and the 15th January, 1852, Gluyas conveyed it by *quit claim* to James Sloan, John Peters and Moses L. Holmes, (*p. 46, f. 107,*) and on the 15th January, 1853, Moses L. Holmes by deed reciting that his interest in the property had "been purchased and paid for out of the joint funds" of his brother Reuben J. Holmes and himself; conveys to him (R. J. H.) an interest in these lands as one of the firm of Peters, Sloan & Co., (*p. 40, f. 90.*) The conveyance is also with warranty only as to those claiming *under, by, or through*
12 him (M. L. H.,) (*p. 41, f. 92.*)

During the last illness of F. W. Davie, (*allegations of Bill unanswered, p. 5, f. 12,*) to wit: On 2d March, 1850, one Lewis A. Beckham obtained from him two *other* deeds. Each of an undivided, *one*-third part of the lands—that is, one to him (L. A. B.) individually, (*p. 52, f. 122,*) and the other to him (L. A. B.) in trust for Mrs. Bedon, the daughter of Hyder A. Davie and her children (*p. 53, f. 126.*)

It will be observed that there were now *five* deeds out of *one-third* each.

13 Beckham having obtained these two deeds—a month after made a lease to one B. F. Briggs for a term of years, of *two-thirds* (⅔ds) of the property, (p. 38, f. 86,) and Briggs two months afterwards, sold and transferred it to John Peters and H. L. Holmes, (*p. 39, f. 88.*)

The defendants, the Holmes, claim that they, with John Peters and James Sloan, that is Peters, Sloan & Co., thus became possessed of the whole property, to wit: one-third (⅓d) in fee under the deed from Gluyas & McCulloch, and two-thirds (⅔ds) under lease for years from Briggs and
14 Beckham. (*Answer § 5, p. 24, f. 54.*)

Peter Sloan & Co., under these deeds and leases, worked the mines, as we allege, to large profits, but as they say (*Answer, p. 24, f. 54, § VI.*), not so much with the view of extracting gold therefrom, as with a view to developing and exposing to view the veins of gold therein, *so as to enable*

them to sell. In June, 1853, they sold the property to a corporation, known as the Belmont Mining Co., for the sum of $125,000. (*Agreement, p. 68, f. 161 ; Deed to Belmont M. Co., p. 47, f. 110 ; Test Jas. Sloan, p. 79, f. 188.*) This sum was 15
paid to Peter Sloan & Co., and deposited to their credit in the Bank of Cape Fear. (*Test. J. H. Lindsay, p. 35, f. 79 ; Bank Account, p. 59, f. 138 ; M. L. Holmes, p. 78, f. 186.*)

Before the transaction was completed, when only a portion of the purchase money, to wit: $50,000, had been paid, Cadwallader Jones, hearing of the sale, gave notice by Mr. Gorrell, his solicitor, to Peter Sloan & Co., that one-third of the purchase money was claimed by him as trustee for the children of Allen J. Davie, under the deed of F. W. Davie, of 15th January, 1833, and called upon him to retain one-third 16
of the money for them, and notified them not to pay over the said third to any one without the consent of Cad. Jones. (*P. 38, f. 85.*)

Peter Sloan & Co. acted upon this notice and refused to settle with Beckham for the share of the proceeds of sale claimed by him until some arrangement was made and paper signed as to the claim of Cad'r Jones. (*Test. Cad'r Jones, p. 65, f. 155 ; Agreement, p. 68, f. 161 ; Bank Acc't, p. 59, f. 138.*)

It will be observed that Hyder A. Davie, who died in 1848, (*test. Cad. Jones, p. 64, f. 152*) had by will devised his whole 17
estate, real and personal, to *F. W. Davie, Lewis A. Beckham,* and *William F. DeSaussure,* in trust for his daughter, Mrs. Bedon, for life, remainder to child or children, living at her death. (*Will, p. 80, f. 191.*) The surviving trustees, Beckham and DeSaussure, were thus entitled to one-third of the proceeds of the sale, in any event; whether the deeds to Beckham of 2d March, 1850, were valid or not, and so $15,000 of the first instalment of the purchase money, (to wit: $50,000,) received before Mr. Gorrell's notice, was at once paid over to Beckham. (*Bank Account, p. 59, f. 138.*) 18
But upon this notice Peters, Sloan & Co. refused further payments to Beckham. (*Test. Cad'r Jones, p. 65, f. 155 Bank Account, p. 59, f. 138.*)

At the time of the sale, Allen J. Davie, the life tenant, who had managed the property, was absent. In the Fall of 1851

he had started upon a journey to California, through the Indian Territory, and has never been heard of since. (*Test. Cad'r Jones, p. 64, f. 152; Mem. p. 80.*) His life or death
19 was long a matter of doubt; a doubt that could only be solved by years, and the fact of his death is even now only a presumption of law, arising from the length of his absence.

William R. Davie, his eldest son, and father of the first named appellants, who resided in Alabama, hearing of the sale of the mines, and in his father's absence, went on to North Carolina, and with Col. Jones, the trustee, employed Cad'r Jones, the son of the trustee, together with Mr. Gorrill, of Greensboro', to obtain the share of the proceeds of sale to which his father's family were entitled. (*Test. Cad'r. Jones,*
20 *p. 65, f. 153.*)

In the Fall of 1853, the deed to Cad'r Jones in trust, was taken by William R. Davie to Chester, S. C., or sent to him there, and Cad'r Jones, Jr., went there also to have it proved. It was left with Mr. McAliley, a lawyer of that place, from whose office it was lost or stolen. Fortunately, Mr. McAliley and his partner Mr. McLure, had made a carefully compared copy, which we now produce. (*Test. Cad'r Jones, p. 65, f. 154, Sam'l McAliley, p. 69, f. 164, J. J. McLure, p. 70, f. 166.*)

21 William R. Davie, while in Chester, S. C., on this business, was taken ill and died there in January, 1854. (*Test. Cad'r Jones, p. 66, f. 154, Sam'l McAliley, p. 69, f. 165, J. J. McLure, p. 70, f. 166, Mem. p. 80.*)

Matters so rested until 28th April following, when Beckham insisting upon the payment of his share of the proceeds of sale, negotiations were entered into between the parties, Cad'r Jones, Sr., being represented by Cad'r Jones, Jr., and Peters, Sloan & Co., by Sloan, "the managing financial agent," and John A. Gilmer, a distinguished lawyer of No. Ca., their
22 counsel, and on the 28th April, 1854, an agreement was drawn by Mr. Gilmer, in the presence of Sloan, Cad'r Jones, Jr., and Beckham, signed by Beckham, and delivered to Cad'r Jones, Jr. (*Test. J. A. Gilmer, p. 32, f. 72, Cad'r Jones, p. 65, f. 155, M. L. Holmes, p. 78, f. 186.*)

This agreement reciting the title of Peters, Sloan & Co.,

through Gluyas, McCulloch, and F. W. Davie, as to one-third, and lease from Beckham of the other two-thirds; that Peters, Sloan & Co. had worked the mines for a year or two; the sale of the mines, by Peters, Sloan & Co., of their interest 23
for $82,333.33, and by Beckham of his interests, individually and as trustee, for $43,666,66; the claim of Cad. Jones, as trustee; the collection by Sloan, one of the firm of Peters, Sloan & Co., of Beckham's part; that "*it is the wish of all the parties to receive the said several purchases, without prejudice to the legal claims of Col. Cad. Jones,*" declares, "*It is agreed that whatever claim the said Cad. Jones had in said gold mine, he he shall have against the several parties who have sold and received the purchase money, instead of the land itself.*"

Beckham further agrees to appear and waive all questions 24
of jurisdiction in any suit Col. Jones, or his *cestuis qui trust*, might institute in Guilford County, N. C., to establish their rights. (*Agreement, p. 68, f. 162.*)

We may as well observe here in passing, that Beckham had *three* distinct claims, such as they were, to the property, and each to an undivided third part, (1), under deed of F. W. Davie to Hyder A. Davie, (7th August, 1831,) as he, with Mr. DeSaussure, was trustee under Hyder A. Davie's will; (2), under the deed to hi n directly, as trustee of Mrs. Bedon, (2d March, 1850); (3), under the deed to him individually, 25
(2d March, 1850). So that, if each of these deeds was valid, he was entitled as trustee, and in his own right, to (3-3) the whole. But he appears, nevertheless, to have claimed only *two-thirds* of the property, and to have been content to receive but *one-third* of the proceeds of sale. While, on the other hand, Peters, Sloan & Co., who claimed *but one-third* of the property (in fee) retained in their hands, *two-thirds* of the proceeds of sale.

The death of William R. Davie stopped, for the time, the prosecution of the claim. The life or death of Allen J. Davie 26
necessarily remained long in doubt, and the scattered condition of the family from Oregon to Texas, Kentucky and South Carolina, covertures and minorities, prevented immediate action, and the war coming on further delayed the claim the appellants now present to this Court.

The Bill in this cause is filed by the children of Allen J. Davie, the *cestui que trust* of Cadwallader Jones, for the alternative relief, either for a partition of the land or an account
27 of the share of the proceeds to which they claim to be entitled, and which, under the agreement of 28th April, 1854, Peters, Sloan & Co. were to hold subject to their claims, "*instead of the land itself.*"

Upon the coming on of the answers the appellants elected to follow the proceeds of sale.

It appearing from the answer of the defendants, the Holmes, that B. F. Briggs had parted with his interest prior to the commencement of the proceedings, and by assignment had vested his entire title in Peters Sloan & Co., and that Peters
28 had died insolvent, the bill was dismissed as to them, and was taken *pro confesso* against James Sloan. (*P. 28, f. 63, 64.*) The other partners of the firm of Peters Sloan & Co. answer and defend the suit. Let us examine their answer. (*P. 23, f. 51, to p. 26, f. 59.*)

The *first* paragraph denies knowledge of the circumstances under which Frederick W. Davie purchased the lands, and of any understanding or agreement concerning it. The *second* denies knowledge of F. W. Davie having owned the lands until about the year 1850. The *third* denies knowledge of
29 the interests of *either Hyder A. Davie*, or Cadwallader Jones. The *fourth* and *fifth* set out their title. The *sixth* denies profits while working the mines, and alleges that the purpose of working them was chiefly to develop them with a view to a sale. The *seventh* gives an account of the sale, and admits the receipt of $82,333.33 "by the defendants (the Holmes), John Peters, and James Sloan, jointly." The *eighth* more specifically denies notice of Cadwallader Jones claim as trustee, and the *ninth* denies directly and explicitly that they, the Holmes, or Beckham, or Peters, or Sloan, entered into the
30 agreement in writing of the 28th April, 1854. The *tenth* alleges the necessity and want of the heirs of Cadwallader Jones, as parties. (*a.*) The *eleventh* and *twelfth* set up defence of the Statute of Limitation.

(*a.*)—Demurrer to same effect overruled, p. 22, f. 49. But Bill amended making said heirs parties, p. 27, f. 61, and said parties answered, p. 70, f. 168.

The case thus presents three principal questions: 1. The claimant's title. 2. The defendant's liability. 3. The plea of the Statute of Limitation.

I.—THE CLAIMANT'S TITLE. 31

a.—As to the delivery of the deed.

His Honor, Judge Dick, observing (*p. 83, f. 200*) that

"The loss of this deed in trust, by accident, before registration would not deprive the plaintiffs of the rights conferred by said deed, if they had sought the relief of a Court of Equity in apt time, and were able to establish by competent and satisfactory proofs, showing that said deed was duly executed and lost by accident before registration, and that the written instrument offered in evidence is a correct copy of the original deed,"

Thus declares his opinion in regard to the deed, *f. 201, p.* 32
84, f. 202:

1st "I am of the opinion that the written instrument is a correct copy of an original instrument signed and sealed by F. W. Davie, in the presence of H'y A. Davie, a subscribing witness, on the 1st of January, 1833 2d. The proofs do not satisfy me that this original instrument was ever delivered to the trustee or *cestui qui trust*, by F. W. Davie, to have operation as his act and deed."

His Honor thus fairly states the proofs presented by the plaintiffs, and which he regards as material:

1st. "The attestation clause in the copy introduced, which is shown to be a correct 33
copy, states that the deed was '*signed, sealed and delivered* in the presence of H A. Davie,' and it was further shown that the original instrument was in the handwriting of F. W. Davie, and the signatures of the grantor and subscribing witness were genuine.

2d. "Col. Cad. Jones, Jr., in his deposition, says: 'My impression is that I saw the deed in the possession of Allen Jones Davie when he lived in Hillsboro, N. C., and that I read it, but cannot speak of its contents'

3d. "Allen Jones Davie and his family (lived) on or near the land conveyed from 1831 to the Fall of 1833, and exercised rights of ownership, and it was generally understood at that time in that neighborhood that he had a third interest in the property."

He says further, on (*p. 86, f. 210*): 34

"It appearing in evidence that the grantor and subscribing witness are both dead, I am of the opinion that the plaintiffs, in showing that the signatures to the original instrument were genuine, would have furnished *prima facie* evidence of its delivery, if they could further have showa that it was in the custody of the grantee during the life of the grantor." (*P. 86 f. 211.*)

Or "in the continuous custody of the *cestuis qui trust*, up to the death of the grantor." (*P.* 87, *f.* 212.)

In another place his Honor says:

35 "I think the plaintiffs have shown a valuable consideration." (*P.*89, *f.* 219)

Is not his Honor mistaken in requiring direct proof of the custody of the deed by the grantee during the life of the grantor, and have not the plaintiffs furnished *prima facie* evidence of the delivery of the deed? Let us examine the authorities.

Best on Presumptions, § 133:

"It may be stated as a general rule that, *prima facie*, *all* documents must be taken to have been made on the day they bear date. * * * * * * * So a deed is presumed to have been executed *and delivered* on the day it is dated."

36 *Philips on Evidence, p. 428:*

"As a deed takes effect from the time of delivery, not from the time of its date, *it may be proved* to have been delivered either before or after the day when it purports to have been made."

Wharton on Evidence, § 1016:

* * * "Ordinarily, however, *the delivery of a deed is presumed* from the facts of signature *delivery* and transfer of possession.

§1314. "Sealing (although there be no impression of a seal) and *delivery*, also, *may be inferred* as a presumption of fact, from attestation and signatures, when accompanied by transfer of possession."

37 (*Stephens' Digest of Evidence, Art. 87.*)

"When any document purporting to be, and stamped as a deed, appears or is proved to be or to have been signed and duly attested, *it is presumed* to have been sealed *and delivered*, although no impression of seal appears thereon."

Oshey vs. Hicks, Cro. Jac. 263.

* * * * Resolved by all the Court that in regard he declares upon a deed *dated* the ninth October, '38. Eliz it shall be always *intended to be delivered, and to have his essence at that time, and at no other.*

Anderson vs. Weston, 6 Bing N. E. 296. Bosanquel, J.

38 "Now when a deed is produced, and the execution of that deed is proved by the subscribing witness, *or by accounting for the absence of the subscribing witness, by death*, or otherwise, *and proving the signature*, and that deed bears a date, as far as my experience goes, that date has uniformly been taken to be *prima facie* evidence *that the deed was executed at the time when it purports to bear date.* * * * * * * * I certainly never heard it contended that it was part of the proof of the person producing the instrument not only to give evidence of the execution of the instrument,

but, in the first instance, and before any evidence is offered to render doubtful the time of making the instrument, that it was executed at the time it bears date. * * * * * But there is another case which may be put on the subject, which is a very strong one, in proof of this being the general rule. That is this. It is a general rule that an instrument, thirty years old, proves itself, provided it be produced from the proper custody. * * * * * * What is the meaning of its being thirty years old? *Parties are not called upon to prove that the deed has been in existence for thirty years.* If it bears date thirty years before the time of its production, the course is, unless it be impeached to receive that as proof of the instrument. 39

Chan. Kent in *Souerbye vs. Arden, 1 Johns. Chan., 252.*

"The general principle of law is that the formal act of signing, sealing and delivering is the perfection and consummation of the deed, and it lays with the grantor *to prove clearly* that the appearances were not consistent with the truth."

Story, J., in *Gardner vs. Collins, 3 Mas. 398.* 40

"A delivery of a deed *may be inferred* from circumstances and need not be positively proved."

Smith vs. Porter, 10 Gray, 67–8.

"The Court instructed the jury * * * * that in the absence of any proof as to the time of the actual delivery of the deed, * * * * *it would be the presumption of law that it was delivered at its date* * * * * it may well be considered *reasonable and safe to conclude* in any particular instance where there is no other evidence upon the subject, *that any legal instrument by which property is conveyed was completed on the day on which it bears date.*"

41

Story, J., in *Flagg vs. Mann, 2d Sum. 509.*

"It is common learning that when a deed of grant is found in the possession of the grantee *it affords a just presumption of a due delivery thereof.*"

Williams vs. Alexander, 7 Ired. Law, (N. C.) 384.

"Proof of the handwriting of the defendants, together with possession by the plaintiffs, was evidence from which a jury *might presume a delivery.*"

Floyd vs. Taylor, 12 Ired. —— (N. C.) 47.

"The delivery of a deed is a question of fact, *and the law has prescribed no particular form in which it shall be made.*" 42

Games vs. Stiles, 14 Pet., 326.

In the conclusion of the deed it is stated to have been signed, sealed and delivered in the presence of the subscribing witnesses. * * * But independently of these facts *the possession of the deed* by the lessor of the plaintiff, who offers it in evidence is *prima facie evidence of its delivery.* Under ordinary circumstances no other

evidence of the delivery of a deed than the possession of it by the person claiming under it is required.

Gould vs. Day, 94 U. S., 412. Field, J.

"Now while it is law that a delivery of a deed is essential to pass an estate, and
43 there can be no delivery without a surrender of the instrument or the right to retain it, *such delivery will be presumed* in the absence of direct evidence from the concurrent acts of the parties recognizing a transfer of the title."

These authorities establish that the delivery of a deed may be inferred from the circumstances, and need not be positively proved. (*Wharton; Gardner vs. Collins; Williams vs. Alexander; Gould vs. Day*), that possession of the deed is *prima facie* evidence of its delivery. (*Flagg vs. Mann, Games vs. Stiles*), that delivery of the deed may be inferred from the possession of the property (*Wharton*), and from signature and
44 attestation (*Wharton, Stephen, Anderson vs. Weston*) that *prima facie* a deed is to be taken to have been made and delivered on the day of its date (*Best, Philips, Anderson vs. Weston, Smith vs. Potter*), and that it shall be intended to be delivered at that time, and at no other (*Oshey vs. Hicks*), that the signatures and handwriting having been proved, in the absence of the subscribing witness, by death, the plaintiff is not called upon to prove that it was delivered at the time of its date (*Anderson vs. Weston*), that the fact of delivery will, under these circumstances, be presumed until evidence to the con-
45 trary is produced (*Philips*), and it lays *with those disputing its delivery to prove clearly* that its appearances are not consistent with the truth. (*Souverbye vs. Arden, Philips.*)

What is *prima facie* evidence? Mr. Justice Story, who asks this question in *Kelly vs. Jackson, 6 Pet., 632*, thus answers: *Prima facie* evidence "is such as in judgment of law is sufficient to establish a fact, and if not rebutted, remains sufficient." The same definition is repeated in *U. S. vs. Wiggins, 14 Pet., 347*, and in *Crane vs. Morris, Lessee, 6 Pet., 621*, it is added that *prima facie* or presumptive proof ought not to
46 be disregarded by the Court.

If then the Court should not disregard *prima facie* or presumptive proof, let us measure this case by the rules in regard to such evidence that we have cited. May not the delivery of the deed fairly be inferred from its circumstances?

We have proved the signatures and attestation of the deed and its possession by the *cestui que trust.* (*Test. Cad'r Jones, p. 65, f. 153-'4; Sam'l McAliley, p. 69; F. F. McLure, p. 70, f. 166*), and possession of the property (*Test. C. P. Mendenhaall, p. 30, f. 68; Abel Gardner, p. 36, f. 81; S. G. Coffin, p. 37, f. 83*), and His Honor finds, in accordance with the testimony, that there was consideration for it (*p 89, f. 219.*) We are *not* then called upon to prove specifically that it *was* delivered at the time of its date until evidence to the contrary is produced, *prima facie* it is to be taken to have been delivered at *that* time, *and at no other*, and the defendants disputing its delivery must *prove clearly* that it was *not* delivered at the time it purports. Have they done so? Let us examine the evidence upon which His Honor concludes that the deed was not delivered. 47 48

His Honor observes, that "Col. Cad. Jones, Jr., the only witness who testifies as to the existence of the deed, and of its custody prior to the death of the grantor, does not speak positively on the subject;" (*p. 86, f. 211*). The evidence of Col. Jones on this point is not essential—it is *cumulative* only. We had satisfied the requirements of the rule of evidence, when we showed by Mr. McAliley, that the *cestui que trust had* possession of the deed, when we showed that the grantor and witnesses were dead, and in their absence had proved the signatures to the deed. Having done so, the burden of proof was shifted to the defendants. It lay with them, then, "*clearly to prove*" that the deed was *not* delivered at its date, and once the burden of proof had thus shifted to them, it so remained until the end of the cause. 49

But examine Col. Jones' testimony: it corroborates our title in the strongest manner. He has an impression that he saw the deed in Allen J. Davie's possession, but he is positive that he frequently heard him speak of his interest in the mine, and of his extravagant estimate of its value. He says, he was retained by his father and William R. Davie to establish his father's claim as trustee, and was instructed by them that the deed had been sent to South Carolina to have it proved; (*p. 65, f. 153*). And to whom was it thus sent for proof? To Mr. McAliley, who testifies that he was F. W. 50

Davie's lawyer; (p. 69). Take all the circumstances into consideration, and the deed can only be objected to on the supposition that there was a conspiracy between the parties
51 to defraud the estate of F. W. Davie, a presumption which the law will not entertain, and which their characters forbid.

b. Ancient deed. His Honor misapprehends our application of the rule upon this subject; (*p. 88, f. 215*). We have not relied upon this rule in the production of the copy as a paper which proves itself; but have proved both the *original* and *copy*. We have proved the original as strictly as if it had been a deed but a year old. We prove by both Mr. McAliley, (*p. 69, f. 163*), and Mr. McLure, (*p. 70, f. 167*), the death of the grantor and witnesses, and then their signatures.
52 No more could be required of us, however recent the deed.

But having thus strictly proved the deed, as a recent deed, it turns out that it was an *ancient* deed, and its delivery is presumed, and here we comply also with the familiar rule in reference to such deeds—a rule as we shall see fully recognized in North Carolina. (*Plummer vs. Baskerville, 1 Ired. Eq.(N. C.)253.*) We prove that the deed once existed—we give some account of its proper custody, and we show possession under it, and having done so, the actual and direct proof of delivery is dispensed with.

53 *c.—As to the minutes of the suit in Equity.—Allen J. Davie vs. Chs. McCulloch, and what they show.*

His Honor has certainly misunderstood the purpose of the plaintiffs in introducing these minutes, and we think has mistaken their purport. He says, (*p. 88, f. 216*:)

> "It appears from the Equity suit above referred to, that the tenant McCulloch held adversely to Allen J. Davie, and would not recognize him as his landlord, and the purpose of the suit was to compel such recognition and payment of rent, and the suit failed because no paramount title was shown by Allen J. Davie."

54 His Honor had just before observed (*p. 87, f. 213,*) that the original papers in the suit are lost, and that we cannot ascertain the purpose of said suit, and the names of the parties only so far as they are disclosed by the brief entries on the evidently imperfect transcript of record, offered in evidence.

It certainly does not appear from these minutes that McCulloch held adversely to Allen J. Davie, nor that the purpose of the suit was to compel McCulloch to recognize Allen J. Davie as his landlord, and his Honor is mistaken in his assumption 55
that the suit failed because no paramount title was shown by Allen J. Davie. There is nothing whatsoever to show that the question of title was involved in that suit. On the contrary, both the minutes and testimony show that the controversy was as to McCulloch's "*operations in working the mines.*"

The first minute which we find (Fall Term, 1833,) is of an order dissolving an injunction, "therefore granted so far as to permit the defendant McCulloch to remove *the ore mentioned in the pleadings* upon his entering into bond," etc., (*p. 50, f. 132.*) The next and only other minute which touches 56
the merits, is an order (Spring Term, 1836,) "without prejudice to either party in the final hearing," that the Master should take an account of the damages sustained by McCulloch "by reason of the injunction therefore granted in this cause, and *suspension of his operations in working the mine in every department thereof*, (*p. 57, f. 135.*)

If we recur to the lease by F. W. Davie to McCulloch, of 31st November, 1830, to which His Honor alludes (*p. 75, 180*), we will observe that the lease was upon a rent and a condition. It prescribed a manner in which the ore was to 57
be assorted, and a condition as to the working of the mine, viz: "to work fourteen men," the failure to do which should "operate as a determination of the lease." The suit then may have been upon an allegation by A. J. Davie, that McCulloch did not properly assort the ore, or that he did not work fourteen men. It is more probable, however, that the suit arose upon the terms of the deed from F. W. Davie to McCulloch (*p. 43, f. 98.*) In addition to his, "*my undivided third part*," which F. W. Davie conveys, the deed goes on: "And I do hereby convey and release to the said McCulloch 58
the exclusive right to direct and manage the working of the mines now open, or to be *opened thereon*, with the power to retain himself one-third of the profits of the said mines." Here was a provision which, taken in connection with the circumstances of F. W. Davie's purchase, and the interests of his brothers,

was pregnant with litigation. Had he the right to give McCulloch such power and control over the mines, when it appeared on the face of his deed to McCulloch that he then
59 only had one "*my*" third interest in the mine? If he had the right to do so, had not Allen and Hyder, or whoever owned the other two-thirds, a right to supervise the work, and to say whether or not McCulloch was working the mines in compliance with the terms of the deed? McCulloch had the right to *retain* but one-third of the profits, had they not the right to inquire into those profits, and to enjoin the disposition of the ore he had removed until they were accounted with? There is strong ground for inference from the minutes that these, or the like, were the questions made in that
60 suit. Thus we account for the fact that McCulloch had been enjoined, and then allowed, upon giving security, to remove *certain of the ore* he had mined.

But these questions would not have involved Allen J. Davie's *title*. Nor is there any evidence that it was questioned in the suit. It is a pure assumption, unwarranted by anything but the merest conjecture. to say that the deed to Cadwallader Jones was one of those mentioned in the rules, the non-production of which caused the suit to be dismissed.

His Honor alludes to the fact, that F. W. Davie was made
61 a party to the suit, and conjectures that he was so made because Allen J. Davie did not have the deed to his share. He asks, why should F. W. Davie have been made a party, defendant, if he *had* executed the deed? The record, as his Honor, observes, is lost, and we can ascertain the purposes of the suit only so far as they are disclosed by the brief entries of the evidently imperfect transcript of record, (*p. 87, f. 213*). We cannot, therefore, say why he was made a party. But the fact that he *was* made a party in the Spring of 1835, (*p. 57, f. 134*), and that the suit continued until December,
62 1840—nearly six years—and that then the Bill was dismissed, with the express reservation, "but *without prejudice* to the plaintiffs' right to file another," is to us conclusive evidence that F. W. Davie did not deny the deed to Cadwallader Jones. We cannot believe that the Court would have been thus careful to guard the right of Allen J. Davie from

prejudice by the dismissal of the bill, if F. W. Davie had been all that time denying that he had executed the deed, and Allen J. unable to produce it. Allen J. Davie surely must have presented a strong case which warranted the continuance of an injunction *after the defendants had answered*, 20th October, 1833, to December, 1840, and that then the bill was only dismissed *without prejudice* to his filing of another, and this, let it be observed, while F. W. Davie was a party to the suit. 63

His Honor suggests that, "if the alleged deed was not executed according to the understanding between Allen J. Davie and F. W. Davie, founded upon valuable consideration, then he might be a necessary party for the purpose of *specific performance*." But the bill appears from the minutes to have been for *injunction* against McCulloch, not for specific performance against F. W. Davie. It had been on the docket, and injunction had been granted against McCulloch for two years before F. W. Davie appears to have been made a party. And if for specific performance against F. W. Davie, why was it against McCulloch in the first instance? 64

We put these minutes in evidence, because, if they do not constitute a *lis pendens*, they at least form a link in the chain of facts, in regard to which the defendants, as we shall show, were put upon inquiry. The effort is made to turn them against ourselves; but admitting, for argument, all the inferences which His Honor has drawn from them, they do not discredit our case. Suppose these minutes showed that Allen J. Davie did not have the deed: what then? 65

His Honor is confused between Allen J. Davie and Calwallader Jones, between the *cestui que trust* and the trustee, Allen J. Davie, had no right to the deed. It was Cadwallader Jones' deed. How then can Allen J. Davie's not producing the deed, of which he was not the proper custodian, affect our rights? And if the suit was about the deed, why, let us ask, was not Cadwallader Jones a party to it? Could this suit have been about this deed, when it was in progress for two years without either grantor or grantee being made parties to it? and when the latter was never called in to defend his title? 66

The inference is irresistable that the suit between Allen J. Davie and McCulloch was as to the *manner* of operating the mines and the *division* of the ores, and *not as to the title.*

67 *d.—As to possession by the parties:*

His Honor says that it appears from the equity suit that the tenant, McCulloch, held adversely to Allen J. Davie, and would not recognize him as his landlord. (*p. 88, f. 216.*) We have shown that this is a mistake; that the title of A. J. Davie was not involved in that suit. But a moment's reflection will further show that, in point of law, McCulloch did not, and could not, have held adversely to A. J. Davie. His deed gave him title to but one-third *as a co-tenant*, and that was all he claimed. His possession was not adverse to the owners of the other
68 two-thirds. His possession was theirs. (*2 Black Com., 194, 4 Kent. 370, et passim.*) He must have ousted the other co-tenants before he could have held adversely to them. (*Angell on Limitations, §419 §433. Thomas v. Garvin, 4 Dev. Eq., (N. C.) 223; Cloud v. Webb, ibid 290; Northcot v. Caspar, vi. Ired. Eq., (N. C.) 303; Linker v. Benson, L xvii N. C. R.. 150.*) But this he did not claim to do, nor could the defendants allege that he did. Dr. Coffin testifies that the Davies worked the mines before McCulloch purchased. (*p. 37, f. 83.*) He, therefore found A. J. Davie in possession; and, Dr. Coffin
69 testifies, he left the property at the same time, if not before A. J. Davie.

There could be no adverse possession, and such would not have been shown, even if McCulloch had had the bill dismissed finally, and on its merits, and had unequivocally established the right to carry on "his operations in working the mines in every department thereof." For, of the two-thirds remaining, the fee of one was in Hyder A. Davie, and of the other, either in Cad'r Jones, trustee, or still in F. W. Davie. His right "to direct and manage the working of all
70 the mines" in the place, was not necessarily inconsistent with the title of the co-tenants in fee, as to the other two-thirds.

It is a mistake, therefore, to speak of McCulloch's holding adversely to Allen J. Davie.

e.—Alleged abandonment of property by Allen J. Davie:

His Honor observes (*p. 88, f. 217*) that, after the dismissal of the suit, in 1841, that Allen J. Davie seems to have abandoned the property, and to have made no further effort to regain possession, or enforce payment of rent. But in this his Honor is mistaken. Allen J. Davie did not abandon the property, any more, or as much as McCulloch himself did. His Honor overlooks the fact that McCulloch left the property at the same time, if not before, Allen J. Davie did. 71

Dr. Coffin testifies, (*p. 37, f. 83*):

"My notion is that he, (A. J. D.,) did not live on the property, but near to it, and that the Davies worked the mine previous to the sale to Charles McCulloch, and after McCulloch bought an interest he raised a large quantity of ore, and went to Charleston and got him an engine and erected it on another piece of land near by, and thereafter trouble (the witness does not know what) grew up, a suit was brought by Allen J. Davie against Charles McCulloch, et. al., which was pending in the Courts a long time. *After this McCulloch left the property and went to Columbia, S. C.*, and Allen J Davie moved to Hillsboro, N. C., and then he moved to South Carolina, and then started to California, and has not been heard of since." 72

The only testimony on the point therefore is that McCulloch left the property at the same time, if not before Allen J. Davie. But not only so, McCulloch not only left the property, but he sells out his interest in it to Gluyas by deed of *quit claim*, in which he emphatically declares, (*p. 45, f. 105*): 73

"To make this conveyance plain as possible, it is distinctly understood that the said McCulloch *makes a quit claim deed and transfer, and does not warrant or defend the title, either to the land or the right of management out of the gold mine*"

Both parties at the end of the suit, cease working the mine and leave the property, but Allen J. Davie's right is reserved by the Court *without prejudice*, while McCulloch sells his interest *without warranty*. Can anything prejudicial to our rights be drawn from this?

f.—Mem. endorsed on deed to Cadwallader Jones. 74

It was urged on the trial below, by the defendants, that the condition endorsed on the deed (*p. 67, f. 160,*) must have been annexed at a time subsequent to the making of the deed, as

it has an additional witness, and the advance mentioned in it could have been appropriately iucluded with other similar charges in the deed, and that the circumstance tends to show
75 that the maker had possession of the deed subsequent to its date, and held the same as security for his debts, and that no proof has been offered that the incumbrance was ever removed by the discharge of the debts. The objection his Honor cites with apparent approval, though he does not distinctly adopt it, (*p.* 85, *f.* 206.)

We cannot see that there is the slightest reason for supposing that the *mem.* was endorsed subsequently to the execution of the deed. On the contrary, the signature of Hy. A. Davie, both to the deed, and to the *mem.* would imply that it
76 was added at the time of the execution ; just as probably we think, the execution was not completed when the advance was recollected, and was added, and then both witnesses signed it. But however that may be, whenever put to the deed, this *mem.* is conclusive that F. W. Davie did not expect or intend to retain possession of it. For why put any *mem.* upon it, unless intended as a valid deed to be out of his possession? If the deed was still in his possession he could withhold it until paid, this or any other advance, and destroy it if not paid. This *mem.* shows that F. W. Davie intended
77 to part with the possession of the deed, and expected it to be in hands of the parties in interest where it was found.

As to the accounts which the deed declares were unsettied and to the settlement of which the deed was subject, that was a matter between F. W. Davie and the *cestui que trust*, and one in which the appellees are in no wise concerned.

g.—Presumption from non-registration.

His Honor observes, (p. 88, f. 214):

"There is another circumstance that strikes me with some force. If Allen J.
78 Davie had the deed in his possession, as shown by Cad'r Jones, Jr., and did not produce it, every presumption to his disadvantage is to be taken against him. He must have also been advised that while his unregistered deed operated in conveying title, it could not be shown in evidence in a suit until registered, and yet no registration was ever effected."

We submit that in the peculiar condition of the registration law of North Carolina, no presumption can be

drawn, from the fact that the deed was not registered by Cadwallader Jones, or his *cestuis que trust*. The st
declares that no deed shall be void as against without registration, but
it has been explained away by the Courts* and its operations 79
suspended by the Legislature, so that it has remained almost nugatory.

In the case of *Hill vs. Jackson, 9 Ired. 331.* Nash, J. delivering the opinion of the Court, in 1849, says:

"The grant is dated in 1783, and ought by the terms of the Act of 1783 to have been registered within twelve months from its date. But the Legislature has uniformly, with one omission, passed laws at every session to enlarge the time. The omission alluded to was at the session of 1821, and care has been taken that there should be no such failure since. * * * * * * *

"The passage of the Acts to which reference has been made, prolonging the time within which grants shall be registered in the county, has practically the effect of 80
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**Tolar vs. Tolar*, 1 *Dev. Eq.*, 460. "If voluntary deed, fairly obtained, is destroyed by the donor before registration, Equity will compel him to convey the same property to the donee." *Morris vs. Ford*, 2 *Dev. Eq* 418. Judge Gaston: "Interest of one who has an unregistered deed liable to be sold under execution * * he has not a mere equity, but an equity and incomplete title. *Plumer vs. Baskerville*, 1 *Ired. Eq.* 253. Ruffin, C. J. "A deed, whether for valuable consideration or not, but good and effectual at law, except for want of registration, and which is lost 81
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N. C. R. 367. Courts of Equity will uphold an unregistered incumbrance against a subsequent registered incumbrance, with notice of the former. *Mercer vs. Wiggin*, *LXXIV. N. C R.*, 48. An unregistered deed upheld *McMillan vs. Edwards.* In case of a deed lost before registry, now that under the code both legal and equitable rights can be united in the same action, plaintiff may ask at same time for the execution of another deed and for the possession of the land.

"*There is scarcely one grant in a hundred which is registered* within two years from its date. Nor is it even thought necessary to examine into the date of its registration. It can make no difference that the grant, in this case, was not registered before the action was brought * * The policy of the continuing Acts may be
83 well questioned, but our duty is to execute the law as we find it."

In *Isler vs. Foy & Harrison, lxvi. N. C. R. p. 551*, Rodman, J. in 1872, says:

"We find it decided that by virtue of the various Acts which have been uniformly passed once in every two years, extending the time for registration of deeds, a registration at any time relates back to the delivery of the deed, and makes it valid from that time, unless between its delivery and registration some period occurred during which it could not be registered, and during which a lien was acquired, avaible to a purchaser under execution." *Scales vs. Fewell*, 3 *Haws*, 18; *Hill vs. Jackson*, 9 *Ired.*, 333.

84 Surely in this state of the law, when there is scarcely one grant in a hundred which is registered as required by law, when the Legislature, year by year, suspends the effects of the statute on the subject, so as practically to render it nugatory, no presumption can be drawn against the validity of the deed because it was not registered.

The fact that it was not registered is strong evidence that it was not the subject of controversy in the suit in equity between Allen J. Davie and McCulloch. When it was needed, we find Col. Jones, the trustee, and William R. Davie, his
85 *cestui que trust*, at once taking steps to have it registered; steps which its loss and Wm. R. Davie's death put a stop to.

II.—THE DEFENDANT'S LIABILITY.

His Honor says (*p. 89, f. 219*):

"The defendants insist that they are purchasers for value, and are not subject to the equities claimed by the plaintiffs, who derive their title under a voluntary conveyance. I think the plaintiffs have shown a valuable consideration, but even if the deed was voluntary, the defendants are subject to the equities conferred, if:

1st. They interfered with or appropriated any of those equities.

86 2d. If they purchased the property and disposed of it with notice of such subsisting equities."

I.—APPELLEES HAD NOTICE.

In discussing whether the defendants interfered with or appropriated any of the plaintiffs' equities, his Honor treats the case as if the plaintiffs were pursuing some particular, 87
undivided, and set apart interest, that is to say, the Holmes' share, or the Beckham's share. This is a mistake. We do not seek any one's interest, but our own. We claim *one undivided third part of the whole*—the claim which Cad. Jones had in the gold mine, and for which the parties who sold and received the purchase money agreed that each one should be answerable "out of the purchase money, instead of the land itself." (*p. 68, f. 161.*) This will appear more fully when we come to consider the agreement and its effect. For the present we will endeavor to meet his Honor's objection, that 88
there is no evidence showing that the Holmes' defendants had *actual* notice of the claims of the plaintiffs, and not sufficient evidence to fix them with *constructive* notice prior to the sale to the Belmont Mining Co. (*p. 90.*)

a.—Notice from Title Papers.

In an article in the *Central Law Journal, May 18, 1877,* on "*Notice Received from Title Papers,*"* an author says:

"The purchaser has constructive notice of the contents not only of his own deed, 89
but of every instrument, constituting a link in his chain of title, whether such instrument comes to his possession or not. And if the recitals in any of such instruments disclose an outstanding title, whether legal or equitable he will be as effectually charged with notice as though he had actual knowledge of the facts disclosed by such recital, whether the recital consists of an unqualified statement of the existence of the outstanding title, or directly refers to another instrument where the same is declared. And such purchaser charged with notice in this manner of any trust subject to which the legal title was held by his grantor, or any antecedent owner of the real estate, takes the same subject to such trust, and holds as trustee for the *cestui que trust*, whose interest is disclosed by the title papers or facts to which their recitals would lead an inquirer of ordinary diligence *Hackworth vs. Damron*, 1 *Monroe*, 237; *Neale vs. Hagthorp*, 3 *Bland*, 551, 586; *Hagthorp vs. Hook*, 1 *Gill and J.*, 270."

90

Sugden Vendors, 2, p. 552.

"Where a man has sufficient information to lead him to a fact, he shall be deemed cognizant of it."

*See Wade on the Law of Notice.

Ibid, p. 556.

"It is well laid down in Equity cases, Ab'r 331, pl. 7, the purchaser who cannot make out a title but by a deed which leads him to another fact shall be presumed cognizant thereof, for it is *crassa negligentia* that he sought not after it.

91 *Whitehead vs. Jordan, 1 You. & Col., Ex. 303, at p. 328.*

"When a party having knowledge of such facts as would lead any honest man using ordinary caution to make further inquiries does not make them, but, on the contrary, studiously avoids making such obvious inquiries, he must be taken to have notice of those facts which, if he used such ordinary diligence, he would readily have ascertained."

Bush vs. Ware, et al., 15 Pet., 93. Head Note:

"No principle is better established than that a purchaser must look to every part of the title which is essential to its validity. * * * * *

"The law requires reasonable diligence in a purchaser to ascertain any defect of title. But when such defect is brought to his knowledge, no inconvenience will ex-
92 cuse him from the utmost scrutiny. He is a voluntary purchaser, and having notice of a fact which casts doubtonthe validity of his title, the rights of innocent persons are not to be prejudiced through his negligence."

Oliver vs. Piatt 3, How., 333, Story, J., at p. 410.

"If, under such circumstances, he choose to remain in indolent ignorance or indifference to the title, it was a voluntary ignorance and indifference which ought not to be permitted to prevail against the rights of the *cestuis que trust.*

See also the cases *Curtis vs. Munday, 3 Met., 406; Jackson vs. Caldwell, 1 Cowen, 622; Pearson vs. Daniel, 2 Dev. & Bat. Eq. 360.*

93 This rule applies to the ordinary cases of a purchaser of the whole fee, but it applies with still greater force to one who purchases into a *co-tenancy.*

In Oliver v. Piatt (supra):

It was held that a co-proprietor of real property, derived under the same title as the other proprietors, *is presumed to have full knowledge* of the objects and purposes and trusts attached to the original purchase, and for which it is then held for their common benefit.

And with still greater force when one purchases into a co-
94 tenantcy *in a mine*, for he, thereby, usually becomes, not only a co-tenant, but a co-partner.

Lindley on Partnerships, p. 61.

* * * * "Tenants in common, or joint tenants of a mine or quarry, may or may not be partners, and the mine or quarry may or may not be a part of a

common stock. But it is highly inconvenient, if not altogether impossible, for co-owners of a mine or quarry to work it themselves without becoming partners, at least in the profits of the mine, *and Courts of Equity are in the habit of regarding persons who work a mine or quarry in common rather as partners in trade, than as mere tenants in common of land.*" 95

Bainbridge Law on Mines, p. 392:

"It may, therefore, be safely asserted that, in all such cases, where the obvious intention of the parties to acquire interest in the lands, for the sole purpose of carrying on mining speculations, can be deduced from the nature of those interests, and the manner of their acquisition, *the parties will be considered, from that circumstance alone, to have entered into a particular partnership, and to be liable to all its consequences.*"

See also to same effect, *Collier Law of Mines, §2, chap. iii, p. 89; Fereday v. Whitewick, 1 Russel v. Mylne, p. 45; Hart v. Clark, 6 DeG., Mac'n & Gor., 232.* 96

The defendants first became interested in these mines under a lease from L. A. Beckham to B. F. Briggs. (*Answer, p. 24, f. 54, p. 39, f. 88.*) Briggs had obtained a lease from Beckham, which he assigned to John Peters and M. L. Holmes. The latter purchased, however, on joint account of his brother, R. J. Holmes, and himself. (*Deed, p. 40, f. 90.*) Beckham's lease was of *two-thirds.* They must have examined Beckham's title and ascertained that he had two deeds from F. W. Davie, both dated 2d March, 1820—one of *one-third* to himself, in his own right, (*p. 52, f. 122*), and one of another *one-third* to him, 97
"*for the use and benefit of Mrs. Julia Bedon, wife of R. S. Bedon, and her children;* (*p. 53, f. 126*)." This would have led them to F. W. Davie's title, and they would have ascertained that he had obtained a deed for the whole from one Teague, 26th January, 1829, (*p. 8, f. 19*). Searching the Registry, then they would have ascertained that F.W. Davie had, 1st January, 1831, conveyed *one-third* to Charles McCulloch (*p. 45, f. 98.*) Here, then, if Beckham had *two*-thirds, and McCulloch *one*, they had the title to the *whole* fee accounted for. But in searching little further they would have ascertained that F. W. Davie had, on 98
the 7th August, 1831, conveyed *another* third part to Hyder A. Davie, (*p. 51, f. 120.*) Now, then, they would have had before them *four* conveyances, each of *one undivided third part.* This surely, was a circumstance which "would have led any honest man to make further inquiries," and, examining the deed to

McCulloch, they would have observed that F. W. Davie then described the interest he was then conveying as "*my* undivided third part." This was notice that F. W. Davie, in 1831,
99 only claimed to have one-third in the property; and supposing the deed he executed to Hyder A. Davie so soon afterwards accounts for another third, they were warned that, before 1831, the remaining third had been disposed of by F. W. Davie. "These defects thus brought to their knowledge, no inconvenience will excuse them from the utmost scrutiny." Making this scrutiny, they would have observed that the deed to Beckham for the use and benefit of Mrs. Bedon and her children, purported to be "for and in consideration of the sum of three thousand dollars, to have been paid by Hyder
100 A. Davie, in his life time," and comparing this with the deed to Hyder A. Davie himself, in 1831, it would have been found to be for the same consideration. Endeavoring, then, perhaps, to connect the two deeds, Hyder A. Davie's will would have been examined. By the will (p. 80, f. 191), Hyder A. Davie would have been found to have devised and bequeathed his *whole* estate *to F. W. Davie, Lewis A. Beckham, and W. F. DeSaussure*, in trust for the sole and separate use of his daughter, Julia Bedon, and *after her death* for child or children then living, with power to change investment, with the
101 consent of his trustees, *or a majority of them, at the request of his daughter*, Mrs. Bedon. If, then, the deed of 2d March, 1850, is to be taken as intended to carry out the trusts of H. A. Davie's will, Beckham had no power by himself to sell without the consent of Mr. DeSaussure, after F. W. Davie's death, and except on Mrs. Bedon's request. If it was regarded as intended to convey a separate and distinct interest, then they were warned that *four* deeds, *each of one-third*, were out. Here were defects brought to their notice. But they, nevertheless, took the assignment and worked in partnership
102 with John Gluyas, who, they say, had acquired one-third from Charles McCulloch. (*Answer, p. 24, f. 54.*)

The defendants thus worked the mines, not so much as they say with a view of extracting gold therefrom, as to develop and expose to view the veins of gold, so as to enable them to sell, (*Answer, p. 24-25, f. 54-55.*) So far they only

had a lease of the two-thirds Beckham claimed, but on the 17th January, 1852, they bought out Gluyas interest. (*Ibid.*)

They had, as we have shown, notice that there was at least some confusion in the title, and as prudent men they must 103
have looked closely into the deeds under which Gluyas claimed, and which he tendered them. Let us too look at them.

Looking first at that which Gluyas tendered them, our attention is at once arrested by the warranty. It is in these words, (p. 47):

"And the said John Gluyas doth covenant and agree that he is lawfully seized in fee of the one-third part of the aforesaid lands and premises, and that he, his heirs, and assigns, shall and will warrant and forever defend the same unto the said James Sloan, John Peters and Moses L. Holmes their assigns, *so far forth as title was con-* 104
veyed to him the said John Gluyas by Charles McCulloch, but no further."

Then looking at the deed from McCulloch to Gluyas, we find that McCulloch was more emphatic in his warning. His deed only purports to be a *quit claim*, (*p. 44, f. 102.*) But not content to leave it to the technical terms by which it would be so construed, he adds to the attestation this distinct, if inartistic notice: (*p. 45, f. 105.*)

"In witness whereof, I have hereunto set my hand and seal. *To make this convey-*
ance plain as possible it is distinctly understood that the said McCulloch makes a quit 105
claim deed and transfer, and does not warrant or defend the title, either to the land or the right of management out of the gold mine, etc"

In *Boone vs. Chills, 10 Pet., at 213*, it is said, a mere release and quit claim makes the deed suspicious on its face, and that such a deed is of itself notice of infirmity of title. And in *Oliver et. al. vs. Piatt, 3 How., 333*, it was held, at p. 410, that a purchaser by a deed of quit claim, without any covenant of warranty, is not entitled to protection in a Court of Equity as a purchaser for a valuable consideration without notice, and he takes only what the vendor could lawfully 106
convey.

May v. LeClaire, 11 Wall, 232, Swayne J.

"On the 27th of July, 1859, Dessaint conveyed, by a deed of quit-claim, to Ebenezer Cook. The evidence satisfies us that Cook had full notice of the frauds of Powers, and of the infirmities of Dessaint's title. Whether this were so or not, having acquired his title by a quit-claim deed, he cannot be regarded aa a *bona fide* purchaser

without notice. In such cases the conveyance passes the title as the grantor held it and the grantee only took what the grantor could lawfully convey."

Had the defendants then had no notice of any other irregu-
107 larities in the title, they were warned by the warranty in the deed tendered them by Gluyas, that there was some infirmity in the title, and this was repeated in a more emphatic manner in the attestation clause in the deed from McCulloch to Gluyas. Thus, put upon inquiry, they would have searched the records of the Courts, and would have ascertained that a litigation had taken place between Allen J. Davie and McCulloch in regard to the working and operation of the mine, and of the ore removed therefrom, which lasted over eight years, and in which Allen J. Davie had obtained an
108 injunction against McCulloch, and which suit was, at last, only dismissed "*without prejudice to the plaintiff's right to file another bill.*" (*P. 59, f. 138.*)

In the case *Worsley v. Earl Scarborough, 3 Atk., 392*, Lord Hardwicke held that decrees which do not put an end to the suit are, of themselves, notice to a purchaser, because the *lites pendentes* are not thereby terminated. And in *Freeman on Judgments*, §204, citing *Bishop Winchester v. Payne, 11, Ves. Jr.. p. 200*, it is said that *lis pendens* continues upon dismissal *without* prejudice, But if not *lis pendens*, of which the de-
109 fendants were charged with notice of its own force and effect, this surely was a matter of which they would have learned upon the inquiry to which they were put by the nature of the deed tendered them, and by the distinct warning in the attestation of that of McCulloch to Gluyas, And here they would have ascertained whose claim it was against which McCulloch would not warrant.

b.—Notice from notoriety of Allen J. Davie's possession:

110 But had they neglected to search the records of the Court, thus put upon inquiry, surely they would have inquired in the neighborhood, where not only Dr. Coffin, Mr. Mindenhall, and Mr. Gardner, whose testimony we have now produced,

but many others, would have told them that Allen J. Davie purchased the land from Teague, who conveyed it to Frederick W. Davie, Allen J. Davie or his family having a third in it; that the Davies worked it together; that Allen J. 111
Davie lived upon it until he and McCulloch, who purchased a third interest, got into a lawsuit about it, after which *both* parties stopped the working of the mines, and moved away. These facts they would have learned, and thus have been informed that it was Allen J. Davie or his family against whom McCulloch would not warrant.

But His Honor says, the notoriety of A. J. Davie's interest and his possession of the property was confined to the neighborhood, and that the defendants resided some distance off. There is no evidence that Peters resided anywhere but in the 112
neighborhood. Sloan lived ten or twelve miles only from the mines, (*p. 79, f. 188,*) and his knowledge was the knowledge of his partners, (post p.). Nor by their own testimony did M. L. Holmes reside any great distance from the mines; (p. 77, f. 183.) But it really does not matter how far they, the defendants, lived from the mines. This was declared in *Bush vs. Ware, et al.*, (*15 Pet., 112.*) McLean, J., says:

"Why was not the defendant bound to search for the will? The answer given is, *the distance was too great*, and the place where the will could be found was not stated on the warrant or any other of the papers. *That mere distance shall excuse inquiry in such a case would be a new principle in the law of notice.*" 113

As asked by Mr. Justice McLean in that case; Shall a purchaser make a bad title good by neglecting or refusing to use a proper amount of vigilance? Surely here the defendants having knowledge of facts which would have led any honest man to make further inquiries, and not having made them, but, on the contrary, having avoided making such obvious inquiries, they must be taken to have had notice of these facts which, if they had used such ordinary diligence, 114
they would readily have ascertained (*Whitehead vs. Jordan, ante*). The defects in the title having then been brought to the knowledge of the defendants, no inconvenience will excuse them from the utmost scrutiny. They were voluntary purchasers, and having had notice of facts which cast doubt

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they would readily have ascertained (*Whitehead vs. Jordan, ante*). The defects in the title having then been brought to the knowledge of the defendants, no inconvenience will excuse them from the utmost scrutiny. They were voluntary purchasers, and having had notice of facts which cast doubt

on the validity of the title they were purchasing, the rights of innocent parties are not to be prejudiced through their negligence; (*Bush vs. Ware, ante*). If, under such circum-
115 stances, they chose to remain in indolent ignorance or indifference, it was a voluntary ignorance or indifference which ought not to be permitted to prevail against the rights of the *cestuis que trust.* (*Oliver vs. Piatt, ante.*)

c. Notice from Inadequacy of Consideration.

If the defendants, then, had shown themselves purchasers for full consideration, the law would still have charged them with notice of the infirmities of the titles they obtained from
116 Beckham and Gluyas. But compare the consideration for the assignment of the lease of two-thirds, and of the conveyance in fee of one-third to the defendants, with that obtained by them so soon afterwards, and we have another circumstance from which the law not only charges them with the effect of notice, but presumes that they actually had notice, and acted upon it.

The assignment of the lease from Beckham to Briggs is of consequence, for upon it the defendants rest their explanation of the striking fact, that while they claimed but *one-*
117 third in fee, they retained *two* thirds of the money realized by the sale, to.wit: $82,333.33; (*Answer, p. 25, f. 55*). Now, what did they give Beckham for this lease? *Nine hundred dollars,* (*p. 39, f. 83.*)

Then look at the consideration in the deed from F. W. Davie to Beckham, and remember that the defendants while undertaking to answer the bill in full, have not noticed the plaintiff's allegation that the deeds to Beckham were obtained during the last illness of F. W. Davie. The consideration is but *two thousand dollars,* whereas by the sale made so soon
118 after, one-third was worth $41,666.66.

Webber and Wife vs. Taylor, 2 Jones Eq. (N. C.) 9.

"Where a purchaser might see from his title deeds that his vendor had given less than one-sixth of what he was giving for the same land, it was a circumstance to put him upon inquiry."

And from this, coupled with other circumstances, it was held that the purchaser had notice of prior equities.

See also notice from inadequacy of consideration. *Fullenwider vs. Roberts, 4 Dev. & Bat., (N. C.) 285; Brooks vs. Martin, 2 Wall, 84.* 119

d. Defence of purchasers for valuable consideration, without notice, cannot avail defendants as not pleaded.

The defendants insist *that* they are purchasers for value, and are not subject to the equities claimed by the plaintiffs. (*p. 89, f. 219.*) The rule as to setting up this defence is thus laid down in *Boone vs. Chiles, 10 Pet. p. 211.*

"In setting it up by plea or answer, it must state the deed of purchase, the date, parties and contents, briefly, that the vendor was seized in fee, and in possession, *the consideration must be stated, with a distinct averment, that it was bona fide and truly paid, independently of the recital in the deed.* Notice must be denied previous to, down to the time of paying the money and the delivery of the deed, and if notice is specially charged, the denial must be of all circumstances referred to, from which notice can be inferred, and the answer or plea show how the grantor acquired title. * * * * The title purchased *must be apparently perfect*, good at law, a vested estate in fee simple. * * * It must be a regular conveyance, for the purchaser of an equitable title holds it subject to the equities upon it in the hands of the vendor, and has no better standing in a Court of Equity. * * * Such is the case which must be stated to give a defendant the benefit of an answer or plea of an innocent purchaser, without notice, *the case stated must be made out, evidence, will not be permitted to be given of any other matter not set out.* 120 121

See, also, Vattier vs. Hinde, 7 Pet. 271.

In the language of the Court, in the case just quoted, the answer in this is as barren of the averments necessary to make a case of such a purchase as would be protected against the prior equities of the plaintiffs as the record is of any fact to support it. There is no allegation in their answer of the consideration that Beckham, under whom they claim, paid F. W. Davie for the conveyance. The bill alleges that the plaintiffs have heard that Beckham procured the deeds from F. W. Davie, during his last illness, (*p. 5, f. 12.*) The deeds are dated 2d March, 1850, (*p. 52. f. 123; p. 54, f. 127.*) F. W. Davie died 9th April, 1860, (*p. 3, f. 7; p. 64, f. 152; p. 69.*) Though the defendants' attention is thus called to the fact, and the suspicious circumstance alleged in the bill, the de- 122

fendants do not meet it in their answer, nor attempt to show consideration by evidence. *Is not this, under the ruling of the Court, fatal to their claim as purchasers without notices?*

123

e.—Defendants had actual and explicit notice.

If then the defendants had no actual notice, the law would hold them as cognizant of all equities the plaintiffs might have. But the defendants had *express* and *actual* notice before they had collected and paid out but a part of the proceeds of the sale.

The defendants utterly deny that Cadwallader Jones ever notified them that he had any interest in the lands, either as trustee or in any capacity, and on information and belief,
124 they deny that *they*, or Lewis A. Beckham, or John Peters, or James Sloan, or any of them, at the receipt of the money for which they sold their interest in the land, entered into an agreement which recited the claim of Cadwallader Jones, and which transferred the claim from the land to proceeds of sale. (*Answer, p. 25, f. 57,*) As the denial is responsive to the bill, we are required to meet it by two witnesses or by one witness with corroborating circumstances. We will comply with this requirement and more.

The defendants in their answer, say that they, with John
125 Peters and James Sloan, worked the mines together, and divided the profits with Beckham, and as we have seen, such a business is regarded in equity as a partnership, (*Ante*, p.—.)

But besides this, and besides the testimony of Mr. Lindsay, that the defendants were partners in the firm of Peters, Sloan & Co., (*p. 35, f. 79,*) and of Dr. Coffin, (*p. 37, f. 84,*) and of Cadwallader Jones, Jr., (*p. 65, f. 154.*) to the same effect, the deed from M. L. Holmes to Reuben J. Holmes, expressly declares that this *mining* property was owned and used by the *mining company*, operating on the said lands *under the*
126 *name and style of Peters, Sloan & Co.*, (*p. 41, f. 92.*) The partnership is not only admitted by the defendants, M. L. and R. J. Holmes and James Sloan, in their testimony, but it is also established by their testimony that James Sloan was the *managing financial agent*, (*p. 78, f. 186.*)

Mr. Gilmer testifies to the fact that his father, the late Hon.

John A. Gilmer, was the counsel of Mr. James Sloan in his mining operations, (*p. 32, f. 72,*) and Mr. Lindsay, the cashier of the bank, who kept the accounts of the firm of Peters, Sloan & Co., testifies that "John A. Gilmer acted as the 127
attorney for the parties," (*p. 35, f. 79.*)

Having thus established the fact of the partnership, and that the defendants Sloan, the two Holmes and Peters were the partners; that Sloan was the managing agent, and that John A. Gilmer was the counsel, we prove by Mr. Gilmer, the younger, that he finds among his father's papers, a package of papers in an envelope addressed to "James Sloan, Esq., Greensboro', N. C.," and having the words endorsed "Deeds, Belmont McCulloch," which package contains among other papers (*p. 32, f. 72,*) this notice, (*p. 38*): 128

Messrs. Peter Sloan & Co.:

Gentlemen: You are hereby notified that one-third of the purchase money for which the McCulloch's mine, in the County of Guilford, has lately been sold, is claimed by Col. Cadwallader Jones, as trustee, for the use and benefit of the children and heirs at law of Allen J. Davie, by a deed from F. W. Davie, bearing date the 15th day of January, 1833. You are therefore requested and notified to retain one-third of said money in your hands, for the use of said heirs, and not pay out the said third to any person or persons without the consent of Col. C. Jones.

Respectfully yours, RALPH GORRELL,
Solicitor for C. Jones and the heirs of A. J. Davie, deceased.

July 23, 1853. 129

Notice to a partner is notice to all the partners. *Story on Agency, 124, §140*; *Parsons on Partnership 196,*; *LeNeve vs. LeNeve, 2 Hare & Wall., Leading Cases, 23*; *Mechanics Bank of Alexandria vs. Seton, 1 Pet., 309*; *May vs. LeClaire, 11 Wall., 233, Story on Part., §107*; Notice to defendants' counsel was notice to defendants. *May vs. LeClaire* (*Sup.*)

But the defendants not only had notice, express and implied, but upon that notice they acted. Let us look at the circumstances. The notice is dated 23d July, 1853. Turning 130
to the Bank Accounts (*p. 59, f. 138*), we find that, on the 18th June, 1853, $50,000 was deposited to the credit of Peters, Sloan & Co., and this, Mr. Lindsay, the Cashier, testifies (*p. 35, f. 80*), was first payment on account of the sale. It appears by the account that, on the 2d July, Peters, Sloan & Co. paid to Peters

$10,000, and, on the 9th July, they paid to Beckham $15,000. The payment to Peters, as he was one of the firm, may be disregarded, so that Peters, Sloan & Co. had parted with but
131 $15.000, and that to Beckham, who, as trustee under Hyder A. Davie's will, was certainly entitled to one-third of $125.-000, that is, to $41,666.66. By the 17th December, they had collected the whole amount of the purchase money. But we find that they withheld further payments from Beckham. James Sloan, it is true, drew $10,000 on account of Beckham and Bedon (*p. 35, f. 80 ; p. 59, f. 138*), but, by the recital in the agreement, it appears that he had not paid it over to Beckham or Bedon, (*p. 68 f. 161*), and there was still a balance of $16,926.65, which was not paid to Beckham, nor to any one
132 for him, until 29th April, 1854.

This delay in settlement with Beckham is thus explained. The notice we have seen is dated 23d July, 1853, and Col. Jones testifies (*p. 65, f. 155*) that there were negotiations with Beckham, at Spring Term, 1854, which resulted in a meeting in his room, at which there were present, Beckham, Sloan (the financial agent of the firm), and Gilmer (the counsel of the firm), and that at that meeting an agreement in writing was drawn up by Gilmer. This agreement is dated April 28th, 1854, and reciting the sale, the claim of Cad'r Jones, as
133 trustee, the collection by "James Sloan, one of the firm of Peters, Sloan & Co.," of Beckham's and Bedon's shares, and that it was "the wish of all the parties for the said several parties to receive their said several purchases, *without prejudice to the legal or equitable claim of Col. Cad. Jones*," declared that it was "agreed that whatever claim the said Cad. Jones had in said gold mine, he shall have against the several parties who have sold and received the purchase money," etc. (*p. 68, f. 161.*)

We are not, at this moment, considering the effect of this paper as an agreement. That we shall do directly. We are
134 only now concerned with it as evidence that the defendants had notice, and acted upon it. This is manifest from its recitals, and from the fact that the day after the agreement was signed (28 April, '54), to wit., on the 29th April, Peters, Sloan & Co. paid over to Beckham the $16,926.65 which they had withheld under the notice of the 23d July, '53.

Mr. Gilmer, as we have shown, was the counsel of Peters, Sloan & Co., and Mr. Sloan the managing agent or member of the firm. They are, therefore, charged with a knowledge of the facts recited in the paper drawn by Gilmer in the 135
presence and with the concurrence of Sloan.

2.—EFFECT OF THE NOTICE.

a.—It countervails the want of registration:

The deed under which the complainants claim was not recorded. William R. Davie (father of the first-named plaintiffs) died while in Chester, S. C., endeavoring to procure the attendance of witnesses to have it recorded.

Chan. Kent, treating of the due execution of a deed, *4 Com. 456*, says: (Prima ed.) 136

"By the statute law of every State in the Union, all deeds and conveyances of land, exeept certain chattel interests, are required to be recorded upon previous acknowledgment of proof. If not recorded, they are good and pass the title as against the grantor and his heirs and devisees, and they are void only as to subsequent *bona fide* purchasers and mortgagees whose deeds shall be first recorded. *The English rule prevails generally in this country, that notice of the deed by the subsequent purchaser, previous to his purchase, will countervail the effect of his registry, and destroy his pretentions as a bona fide purchaser.*"

To the same effect see *Le Neve v. Le Neve, supra*, and cases there cited, among which are *Pike v. Armstead, 1 Dev., Eq. N. C. 110; Bailey v. Wilson, 1 Dev., & Bat., ch. N. C. 182;* see 137
also *Findlay v. Hinde, 1 Pet 241.*

The Registry law of North Carolina provides that no *deed of trust or mortgage* shall be valid at law unless recorded within the specified time, and the provision has been constantly excepted in the acts which are regularly passed suspending the effect of the registry law in regard to other conveyances. (*Ante p. 23.*) But the "*deed of trust*" thus excluded from the operation of the suspension acts, are deeds for the security of money, or, in other words, and more 138
properly, *mortgages.*

This was explained in the case of *Green vs. Kornegay, Jones Law (N. C.) IV. p. 69*, in which it is said:

* * * * "The deed in quession *was not a security for money*, and is not therefore one of those deeds which must be proved and registered within six months, or be void as to creditors and purchasers."

But notwithstanding the execution of mortgages (or deeds of trust, as mortgages are thus styled in North Carolina and in some other States) from the suspension of the recording
139 Acts, it has been several times considered whether notice would not countervail the neglect of registration, even as regards such deeds.

In the first, *Fleming vs. Burguin, 2 Ired. Eq. N. C., 588,* Ruffin, C. J., after discussing the policy of the Act, and evidently inclining to the opinion that the Legislature had intended to make registration an essential ingredient in a mortgage or deed of trust, to make it a security against a creditor or purchaser, says :

> But if it were otherwise, and *we do not find it necessary in this case to say positively*
> 140 *that it is not*, we hold that, though notice may deprive a subsequent purchaser of the protection of the Act, yet the notice here is not sufficient.

And, after citing and commenting upon several English cases, the Chief Justice goes on to say :

> "These cases leave no doubt of the kind of notice or fraud in the prior incumbrance which will reinstate him in his preference. It is called sometimes "actual notice," and sometimes "exact knowledge" of the situation of the parties. From which it should seem to follow that such notice of the contents of the instrument as to the subject and purposes of the conveyance, must substantially reach the party *in pais*, as would be derived from the registry itself."

141 We ask attention to this case the more especially because it is the one relied on by his Honor to show that the defendants in the case did not have sufficient notice, (*p. 89, f. 221.*) It will be observed, as we have already pointed out, that Fleming & Burgum was one, in relation to a "deed of trust" or mortgage, and not to an actual conveyance. But as his Honor relies upon it, let us read on. The very next sentence Chief Justice Ruffin explains :

> "We do not mean that information precisely correct as to every thing conveyed, or as to the amount of each debt secured, would be necessary to give any effect to the
> 142 deed, but that at most it would only be set up against the purchaser for such purposes as it was distinctly represented as intended to effect, and effecting, and that such representation must at least be true as far as they go, and convey something like the true contents of the instrument"

Now in our case surely Mr. Gorril's notice, (*p. 38,*) was as full as required by the rule laid down in *Fleming vs. Burguin.*

It distinctly represented the purposes of the deed to Cadwallader Jones, namely, " for the use and benefit of the children and heirs at law of Allen J. Davie." It gave the date of the deed, " 15th day of January, 1833," and the amount of 143
the interest claimed under it " one-third." These representations were certainly true as far as they went, " and conveyed something like the true contents of the instrument."

The Courts of North Carolina thus refused to say, even in regard to mortgages, that the deed would be void for the want of registration, as to those who had notice, but were at pains to prescribe a rule as to what notice would countervail the want of registration. But the law in North Carolina on this point has not been left in doubt. In a late case, *Leggett vs. Bulloch, Busbees Law, 287*, it was held *that as between the* 144
parties a mortgage is valid without registration. That case, like ours, was one of a lost deed, and the Court observes *that the want of registry is the result of accident in the loss of the deed.* In a still later case, *McLemon vs. McLeod, LXX. N. C. R., p. 264*, it was ruled that Courts of Equity will uphold an unregistered conveyance against a subsequent registered incumbrance, with notice of the former.

b.—Defendants taking with notice of the claim of Cadwallader Jones, they took subject to it. 145

The defendants first took under deed from Gluyas, who would only covenant that he was lawfully seized of the one-third " *so far forth*, as the title was conveyed to him by McCulloch, *but no further.*" This gave them notice of the infirmities of his title, and by McCulloch's deed they learned that he only made a *quit claim*, and again put them on inquiry, and they were thus lead to a knowledge of the litigation which had taken place between McCulloch and Allen J. Davie, in relation to the profit of the mines, in which the bill had been dismissed, but *without prejudice* to his filing another. 146
The defendants are not, therefore, regarded as *bona fide* purchasers without notice, but, on the contrary, are charged with notice of our claim. They took under the lease to Briggs from Beckham, and are again charged with notice that Beckham's title depended on the validity of *four* deeds, each of

which purported to convey *one-third.* Having thus taken and attempting to sell, before they had received but a part of the purchase money, they receive explicit notice of the claim of
147 Cadwallader Jones, and are warned to reserve one-third share of the proceeds of sale for Jones, *cestui que trust.* They act upon this notice, and withheld payment from Beckham.

But with this notice the defendants, nevertheless, carry on the sale of the *whole* property. There can be no doubt about this. In their answer, it is true, they would represent that they sold *their* interest, and Beckham *his*, without reference to each other, but the deeds themselves contradict this position. Both deeds to the Belmont Mining Co., that of Peters, Sloan, and of the Holmes (*p. 48, f. 111*), as well as that
148 of Beckham (*p. 49, f. 116*), contain this recital:

* * * "And whereas, the said John Peters, James Sloan, Moses L. Holmes, Reuben J. Holmes, and Lewis A. Beckham, have sold *and agreed to convey* the said McCulloch gold mine tract of land to the Belmont Mining Company for the sum of one hundred and twenty-five thousand dollars, of which eighty-one thousand six hundred and sixty-six $66\frac{2}{3}$-100 are paid to John Peters, James Sloan, Moses L. Holmes, and Reuben J. Holmes, and the balance, forty-three hundred and thirty-three $33\frac{1}{3}$-100 dollars, to said Lewis A. Beckham, *all said parties* interested as aforesaid having agreed to convey all their several interests aforesaid to the Belmont Mining Company, *so as to vest in said Belmont Mining Company a sure, full, and complete title in fee simple.*"

149 Nor was the Belmont Mining Co. content with this recital. They required a special covenant of warranty. The deed of Peters, Sloan & Co. thus concludes (*p. 48, f. 113*):

* * * "And the said John Peters, James Sloan, Moses L. Holmes, and Reuben J. Holmes, for themselves, their heirs, executors, and administrators, *do covenant and agree* to and with the said Belmont Mining Company and their successor and assigns, *that they are seized and possessed of the estate hereby conveyed, and have lawful power to convey, the same as herein stated,* and that they will forever warrant and defend the title to the same against the lawful claim and titles of all persons whatsoever."

It is true that it has been held in North Carolina, as gene-
150 rally throughout the United States, that no precise technical language is required by law in which a covenant shall be worded. *Medgett vs. Brooks, 12 Ired. 145.* But for this very reason, technical language must have the more effect

when used, as their use shows that care and skill was employed about the matter. In this instance care and skill is apparent. The usual covenant "to warrant and defend the title from all persons whatever," is not in North Carolina a 151
covenant of seizure, and, therefore, an action will not lie for want of title in the covenantor in the land at the time he conveyed it, nor until some claim has been made or the covenantee otherwise disturbed in his possession. (*Woodward vs. Ramsey, 2 Hawks, (N. C.) 335.*) We have not been able to show that any express notice was given to the Belmont Mining Company, Col. Jones, the trustee, not hearing of the sale until it was completed, but that Company doubtless had been led in the examination of the title to a knowledge of the doubts and suspicions resting upon it, 152
hence they required, and the defendants agreed to, and did give, a special covenant of seizure. In other words, having notice of our claim, they undertook to sell the lands and mines, covenanted that they had full title and warranted against our claim or any others.

In doing this the defendants constituted themselves the trustees *de son tort.*

Hill on Trustee, p. 173:

"There is another class of trustee which may be referred to a constructive trust of the description now under consideration. This is trustees *de son tort*, or those who of 153
their own authority enter into possession or assume the management of property which belongs beneficially to others."

And see note.

Perry on Trusts, § 245:

"A person may become a trustee by construction, by intermeddling with and assuming the management of property without authority. Such persons are trustees *de son tort*, as persons who assume to deal with a deceased person's estate without authority, are administrators *de son tort*. * * * * If one enters upon an infant's lands and takes his rents and profits, he may be charged as a guardian or trustee, and so if one take personal property. If a deceased person hold money or other property in trust for another, and his heir, executor, administrator, or assume possession of such property a 154
constructive trust will be imposed upon them. During the possession and management by such constructive trustees, they are subject to the same rules and remedies as other trustees, *and they cannot avoid their liability by showing that they were not in fact trustees, nor can they set up the Statute of Limitation.*"

Lord Chancellor Cottonham, in *Racham vs. Siddall, 1 Mac'n Gordon, 621*, says:

* * If a party take on himself to act as trustee and sell a trust estate and receive the purchase money, it will not do for that party, whether the purchase money remains in his pocket or he hands it over to some one else under circumstances that leave him liable to say: "I do not think that under the circumstances I was strictly speaking a
155 trustee, somebody else was, and, therefore you the party who is the *cestui que trust* can not call on me for the purchase money."

See this case commented on, affirmed by Lord Campbell, in *Life Ass., of Scot. vs. Siddall, 3 DeG., F. & G., 77.*

The defendants in their answer, § VI., (*p. 24, f. 54,*) admit that they worked the mines from about the 12th August, 1850, to the 22d June, 1853, but they go on to say that they "utterly deny that they made *large* profits, or *any* profits by means of working said mines. They here admit that they worked the mines—*all* the mines for three years—but deny
156 that they made any profits. Yet in the preceding section (§V.) they say, and these defendants paid together John Peters and James Sloan, as toll to the said Lewis A. Beckham, one-seventh of two-thirds of *all* the gold extracted from said land, and in the agreement (*p. 68*) drawn by Mr. Gilmer, in the presence of Sloan and Beckham, they say: "Whereas, Peters, Sloan & Co. worked said mine for some year or two, and paid one-seventh of the two-thirds of all the gold extracted whilst they worked the mine to said Lewis A. Beckham, for himself and as trustee aforesaid. If, then, the complainants
157 are entitled under the deed they set up, the defendants did "enter into possession, and assume the management of property which belonged to the complainants beneficially," and by intermeddling and assuming the management of the property without authority, and taking the gold, the rents, and profits of the lands of the infants, they became trustees, *de son tort.*

It is no answer to say that these profits were small, nor do we believe that they were so. Peters, Sloan & Co. purchased, 17th February, 1852, by deed of *quit claim*, the one-third in-
158 terest of Gluyas in these lands, for the sum of $5,750 (*p. 46, f. 107*), and Beckham's deed, 2d March, 1850, recites consideration (but of which there is no proof) of $2,000, for one-third (*p. 52, f. 122*), and the deed of 2d March to him, for Mr. Bedon, recites a consideration of $3,000, paid by Hyder A. Davie to F. W. Davie, in his life time (*p. 53, f. 126.*) This

land, then, had been purchased, by their showing, in less than two years before, at $10,750, and they then sold it at $125,000. Can it be believed that no profits had been made in the working of a mine the value of which had been increased more 159
than ten times in less than two years? There were profits, and we are entitled to an account of them, whether great or small.

c.—Defendants taking, with notice of the claim of Cadwallader Jones, they took subject to it, and are considered debtors for the money produced by the sale, and liable to an account for the rents and profits.

The defendants thus having taken, with notice of the claim of Cadwallader Jones, and therefore subject to it, they are 160
liable upon any trusts which the complainants may establish in relation to the property.

The rule upon the subject is thus laid down in *Perry on Trusts:*

"§844. If a trustee disposes of the trust estate to a purchaser for a valuable consideration without notice, the *cestuis que trust* may compel the trustee to purchase other lands of equal value, or the *cestuis que trust may elect to take the proceeds of sale, with interest.*"

The author cites the case of *Denton vs. Davies, 18 Ves., 499.* In this case the bill sought to subject certain estates, which 161
it was charged were purchased with the proceeds of sale of certain other settled estates sold by the trustees to the original trusts—to substitute the one for the other—Sir William Grant, M. R., says, at p. 504:

"Upon the supposition that the plaintiffs should fail in that relief, the bill prays that the defendant may be compelled to answer, not merely the money produced by the sale of the estates, but so much as they would now have been worth if they had not been sold. Perhaps there would be nothing inequitable in the adoption of such a principle, but there would be great difficulty in its application, and I am not aware of any decree that has proceeded upon it. *Thecefore I can only consider the defendant as a* 162
*debtor for the money produced by the sale, of which an account must be directed; also an account of the rents and profits, * * * and of any timber cut upon the estate.*" * * *

See also *Daniels vs. Dawson, 16 Ves., 249,* and as to account against one entering upon an infant's estate. *Bennett vs.*

Whitehead, 2 P. W., 644; Dormer vs. Fortesque, 3 Atk., 130; Hicks vs. Sallett, III. DeG. Mac'rr & Gor., 802.

In *Freemont vs. Cook, VI. Ired. Eq., 373*, Nash, J., says:

163 "When trust property has been improperly disposed of, and is capable of being followed in specie, the party in possession, with notice, will be compelled to re-convey it. If it cannot be followed, or the person in possession cannot be liable to the trustee, *the trustee will be decreed to compensate the cestuis que trust by payment of the value of the property so lost, and also to account for all rents, hires, interests, and other profits, which could or might have been made from the property so lost.*"

Mr. Justice Story, in *Oliver vs. Piatt, 3 How., 333*, says at p. 401:

"And if the trustee has invested the trust property or its proceeds in any other property into which it can be distinctly traced, the *cestuis que trust has his election either to follow the same into the new investment, or to hold the trustee personally liable for the*
164 *breach of the trust.*"

And Mr. Justice Swayne, in *Seymour vs. Freer, 8 Wall., 214*, says:

"If a valid sale had been made the trust would have followed and bound the proceeds in like manner as it bound the property."

See also *Bank vs. Seton, 1 Pet., 309.*

3.—THE DEFENDANTS LIABLE UPON AN EXPRESS TRUST

165 The defendants not only thus had notice, express and implied, constructive and explicit, but upon that notice they acted, and withheld payment from Beckham; nor only so, but they entered into an agreement, by which it was declared that (*p. 68, f. 161*):

"It is agreed that whatever claim the said Cad. Jones had in said gold mine, he shall have against the several parties who have sold, and received the purchase money, each one being answerable to the rights and claims of said Jones out of the purchase money, *instead of the land itself.*"

166 In considering this agreement, we shall notice, first (*a*), the objections which have been made as to its obligation upon the defendants; next (*b*), as to the obligations upon Cadwallader Jones, the trustee, and, lastly (*c*), its effect.

a 1. As to the question whether or not the firm of Feters, Sloan & Co. are bound by the agreement drawn by their counsel, Gilmer, in the presence of their partner and agent, Sloan? And, herein, of the suggested dissolution of the firm. 167

(1) His Honor says (*p. 91, f. 226.*):

"The view which I take of the agreement signed by Beckham renders it unnecessary for me to decide the question as to the power of partners to bind each other by contracts. I think the agreement is not binding, as to the defendants, for the reason that it is not of mutual obligation."

As, however, the point will, doubtless, be pressed before this Court as earnestly as it was below, let us examine it. Are the defendants bound by the act of James Sloan, their partner? Was the agreement within the scope of their business? What was their business? Let the defendants themselves answer. (*p. 24, f. 54.*) 168

"vi. These defendants, further answering, say that they worked the said mines from about the — August 1850, to 22 June, 1853, and these defendants utterly deny that they made large profits, or any profits by reason of the working of said mines; that whilst they were engaged in working said mines, it was not so much with a view of extracting the gold therefrom, *as it was to develop and expose to view the veins of gold therein, and that this was done with the view of enabling these defendants to sell their interests in the said mining property to the greatest advantage, etc.*"

169

The object and scope of the partnership then was to sell these lands, or their interest therein, and, in this business, Sloan was the managing partner. Hear how Moses L. Holmes himself speaks of Sloan's powers and conduct in the affairs of the concern. He testifies (*p. 78, f. 186.*):

"7th Question.—To what extent and of what values did you raise ores during the time elapsing before you sold the mines? (Question objected to.)

"Answer.—I cannot say. *Mr. Sloan was the managing financial agent; he knows, perhaps.*

"Question.—To whom did you sell? who made the sale, and when, and on what terms? 170

"Answer.—*Mr. Sloan made the sale*, but all the parties were consulted," etc.

This testimony Reuben J. Holmes corroborates (*p. 78, f. 187*), and Sloan, who also testifies (*p. 79, f. 188*), does not deny it.

Thus, carrying out the very purposes of the partnership, Sloan had effected a very advantageous sale, but before it was completed, Col. Jones, the trustee, through Mr. Gorrell, his
171 counsel, had given notice of his claim, and demanded *one-third* of the proceeds of sale. The firm of Peters, Sloan & Co. collected the whole of the proceeds of the sale—Beckham's share as well as their own. (See bank account, *p. 59, f. 138.*) They had refused to settle with Beckham until this claim of Col. Jones' was settled. But the Belmont Mining Company had required, as we have shown, the special covenants of seizin and power to convey, and, if their title was disputed, could sue upon those covenants at once, though no eviction had been had. Col. Jones was claiming, and threatening suit
172 for his share (⅓), and Beckham was pressing for the share he claimed (⅓). If some settlement was not made, and these parties sued, the Belmont Mining Company would sue upon their warranty.

We were asked, with much earnestness, in the trial below: To what did the warranty of Peters, Sloan & Co. extend? And to the question the counsel who asked himself answered: To just *one-third*, and to that *one-third* he insisted there was an unquestioned title. His Honor seems inclined to agree with the defendants' counsel in this answer (*p. 89, f. 220*).
173 We have already touched upon this point. Peters, Sloan & Co. did by no means restrict themselves to a *one-third* in their warranty. Reference to their deed (*p. 47, f. 110*) will show that they claimed to be owners of one individual third part in fee simple, and, *as lessees of L. A. Beckham of the two-thirds, up to the 4th April, 1858*, and this is what they undertook to convey and to warrant, *so as to vest in said Belmont Mining Company a sure, full, and complete title in fee simple.*

174 This fact was dwelt upon below by the defendants to aid them in a dilemma in another part of this case. When they were endeavoring to explain the very significant circumstance that though claiming but *one-third* in fee they received *two-thirds* of the proceeds of sale, they insisted that Peters, Sloan & Co. had the whole lands in them, *one*-third in fee and *two*-thirds

for a term, which term was of sufficient value, they said, to account for this singular circumstance to which we then asked attention, and now again urge upon this Court to consider. 175

If this claim of Jones was pressed, and if Beckham was not settled with, and sued, they were liable upon their warranty. If withheld until after 1858, the firm would be released from the warranty to the *two-thirds* they had warranted on Beckham's lease.

In this complication of affairs, Beckham, Sloan and Mr. Gilmer, their counsel, call upon Cad'r Jones, Jr., the counsel of the trustee, and agree that if he would let them pay Beckham his one-third, and would not press his claim as trustee until he could produce his deed, that they would agree that 176 whatever claim Cad. Jones had in the gold mines he should "*have against the several parties who have sold and received the purchase money, each one being answerable to the rights and claims of said Jones, out of the purchase money, instead of the land itself.*"

The general rule undoubtedly is that a partner's authority to bind his co-partner extends only to matters within the scope of his partnership. *Story on Part.*, §*102*. But this has its modifications. In *Parsons on Contracts*, *1 vol. 184*, it is thus stated : 177

"The act of eaeh partner is considered as the act of the whole partnership, or of all the partners, only so far as that act was within the scope of the business of the firm, *but one co-partner may bind him in matters out of their usual course, if they arose out of, and were connected with the usual course of business.*"

For authority for this position the author refers to *Sandilands vs. Marsh*, *2 B. and Ald. 673*, a case which was said by Chief Justice Abbott to have been fully and ably discussed at the bar, Scarlett and Wilds being of counsel engaged in it. 178

Chief Justice Abbott says :

"It has undoubtedly been held that, in a matter wholly unconnected with the partnership, one partner cannot bind the other. But the true construction of the rule is this: *That the act and assurance of one partner, made with reference to business transactions by the firm, will bind all the partners.*"

And Bailey, J., (p. 679.)

"It is true that one partner cannot bind another out of the regular course of dealing by the firm. *But, where the assurance has reference to business transacted by the part-*
179 *nership, although out of the regular course, it is still within the scope of the authority, and will bind the firm.*"

And Best, J., adds, (p. 682.)

"I am clearly of the same opinion on both points. If we were to decide the first point (whether the defendant should be held to be bound by the guarantee given, without his knowledge, by his partners), in favor of the defendant, we should place persons who have occasion to deal with partnerships, in a new and difficult situation; for, unless they made inquiry from every one of the partners, whether they assented to the transaction, which, in many cases, would be impossible, they would have the security of the individual only, and not that of the firm."

180 It was urged by the defendants, the Holmes, that the agreement entered into by Sloan was not within the scope of the partnership business, and that they were not bound by the Act. The agreement was made in settlement of a transaction directly within the scope of the partnership business. The business of the firm was the sale of these lands, and the agreement was entered into on settlement of a claim upon the proceeds of sale. This, we insist, was strictly within the scope of the business.

But if it was not, still "the act and assurance" of Sloan,
181 (one of the partners) that whatever claim Col. Jones had against the gold mine he should have against the several parties who had sold and received the purchase money instead of the land itself, was "made with reference to business transacted by the firm," *viz:* the sale of the mines, and so "will bind all the partners." The assurance that each one would be answerable to his rights and claims of Cad'r Jones, out of the purchase money "had reference to business transacted by the partnership," and if "out of the regular course, is still within the scope of his authority and will bind the
182 firm."

But again; if Sloan had not had authority to have entered into that agreement, the Holmes confirmed and sanctioned it by their acquiescence. Mr. Lindsay's testimony, (*p. 35, f. 79*), and the Bank account, (*p. 59, f. 138*), show that the whole proceeds of sale were collected by Peters, Sloan & Co., and

deposited in Bank to the credit of the firm, and by the firm from time to time disbursed. It appears, also, by the bank account, that the Holmes drew out their share in three payments or instalments upon checks of Peters, Sloan & Co., 183
(*p. 35, f. 80*), and they knew, therefore, that up to the time of the agreement, 28th April, 1854, a large part of Beckham's share had been detained by the firm, and remained on deposit to their credit; and that on the 29th April, the day after the agreement, it was paid to him. This was their business, quite as much as the business of Peters or of Sloan, and they ought to have known it if they did not.

In *Sandilands vs. Marsh*, just quoted, Abbott, C. J., says: at *p. 628*.

"Now the sale must have appeared in the partnership books, * * * 184
that sale therefore, and the fact that the proceeds had been laid out in the purchase of an annuity, either was actually known or ought to have been known to Marsh."

The Holmes, then, either knew, "or ought to have known," of the agreement of Sloan, and that the firm acted upon it, and having obtained the advantage of a settlement with Beckham, and avoided a suit by the Belmont Mining Company, they cannot now repudiate the agreement. They are bound by acquiescence.

But our case is *stronger* than this. Sloan was not only a 185
partner, but he was the special agent of the firm in this transaction. Moses L. Holmes, as we have seen, testifies, that he "was the *managing financial agent*;" that "*Sloan* "*made the sale.*" He was the managing financial agent of a firm whose business it was to develop these mines for the purpose of sale, and as such sold them.

We have seen that, "for most practical purposes, a party dealing with an agent who is acting within the scope of his authority and employment, is considered as dealing with the principal himself." If the agent, at the time of the con- 186
tract, make any representation, declarations or admissions touching the matter of the contract, it is treated as the representation or admission of the principal." *Story Agency, §135, LeNeve vs. LeNeve, Bank vs. Seton, supra.*

Here we have Sloan in the two fold character of agent, (1), as a partner, and (2), special agent—admitting that Col. Cad. Jones, of Hillsboro'. as trustee, claimed one-third of said
187 mine as trustee for Allen J. Davie, wife and children, as he alleges, under a deed from William J. Davie," admitting and representing that "it is the wish of all the parties to receive the said several purchases without prejudice to the legal or equitable claim of Col. Cad. Jones;" i. e., legal claim to the land, or equitable claim to the proceeds of sale, and agreeing, thereupon, "that whatever claim the said Cad. Jones had in said gold mine he shall have against the several parties who have sold and received the purchase money, * * * instead of the land itself." This is an agreement for the firm
188 based upon admissions and representations in the scope of his employment, by which the members of the firm are bound.

But again, our case is still stronger; for not only did Mr. Sloan, partner and agent of the firm, make these admissions and representations, and agreement, but Mr. Gilmer, the counsel of the firm, took part in the negotiations, and reduced these admissions and representations, and the agreement to writing, and this was notice and knowledge to the firm of what was done on that occasion. *LeNeve vs. LeNeve,*
189 *May vs. LeClair; Smith vs. Sheely; Hill on Trustees, 514.*

We have, then, the firm triply bound by the agreement, (1), the partners are bound by it, because it was made within the scope of the partnership, and with reference to the business transacted by the firm; (2), they are bound by it, because made by Sloan, who was not only partner, but managing agent; and (3), they are bound by it, because made also by their counsel.

But it was suggested in argument that the business being the sale of the mines—that upon the sale, the object of the
190 partnership was accomplished, and the firm *ipso facto*, dissolved. His Honor declares that it was unnecessary for him to decide this point, (*p. 91, 226.*) As it will probably be again urged, we must briefly notice it.

If there was anything in this defence, our answer would be that it was not taken in the pleadings, and even if it appeared

in testimony, could not be set up. (*Dem'l Ch. Pt. & Pv., 814.*)

But this defence is no more supported in testimony than alleged in pleadings. It is a "theory" of counsel reserved 191
until argument, to which the Court cannot listen.

But if the Court could now listen to the suggestions of the defendants, could put it in their answer, and produce testimony to support the allegation, it would not avail. If they could show that the firm was dissolved, then and there, upon the sale and had notice been given of the dissolution, it would no doubt be a good defence to any undertaking by any partner in relation to a new subject matter, but it was held in *Butchart v Dresser 3 DeG., M. & G., 542*, at *p. 544*, that

"The general law is clear that a partnership, though dissolved, continues for the 192
purpose of winding up its affairs. Each partner has, after, and notwithstanding the dissolution, full power to receive and pay money on account of the partnership, and has the same authority to deal with the property of the partnership for partnership purposes, as he had during the continuance of the partnership. This must necessarily be so If it were not at the instant of the dissolution, it would be necessary to apply to a Court for a Receiver in every case," etc.

See the subject fully discussed in *Lindley on Partnership, Vol. 1, p. 427.*

The Bank account in this case shows the necessity of the rule. In their answer the defendants say that the sale took place on the 22d day of June, 1853. (*Par. VII., p. 25,* 193
f. 55.) By Mr. Lindsay's testimony, (*p. 35, f. 79,*) and the bank account, (*p. 59, f. 138,*) it appears that the firm went on transacting the business of collecting and paying out the proceeds of sale from July 1, 1853, *ten days after the sale*, until the 12th May, 1854, *two weeks after the agreement.* If the firm was dissolved on the 22d June, 1853, by the sale *ipso facto*, as the appellees claim, how could they have drawn out the money and closed the account?

We conclude therefore, that the firm of Peters, Sloan & Co., and all its members, are clearly bound by the agreement 194
entered into by James Sloan, their partner and agent, and reduced to writing by John A. Gilmer, then counsel and attorney.

b.—As to the question whether or not the agreement was of mutual obligation, and whether or not it was beyond the competency of Cad'r Jones, the trustee, to make.

195 The objection to the agreement on the ground that Cad'r Jones was not authorized to make it, or, as put by his Honor, (*p. 91, f. 226,*) "the trustee, by the express terms of the deed in trust, could not sell the land except by the consent of Allen J. Davie or F. W. Davie," that "any other disposition of the land by the trustee would be inoperative, as it was a breach of trust, of which the defendants had constructive notice," and that therefore, it is not of mutual obligation, could *only* have been taken by the *cestui que trust.*

The effect of the agreement was to allow the *cestui qui trust*
196 the option whether or not to substitute the purchase money for the land. It remained only for them to confirm or disallow it.

The doctrine of constructive trust arising from a purchase from a trustee, with notice, is based upon the ground that the trustee had no right to sell. (*Hill on Trustees, p. 164.*) To allow one who had obtained possession of an estate, for valuable consideration or otherwise, from a trustee, to turn round and set up the want of authority in the trustee to contract, is to sweep away the whole of this important doctrine of
197 equity. Equity does exactly the reverse. It allows the *cestui qui trust* to decide for himself whether he will confirm the unlawful disposition of his property, and call upon the original trustee for the proceeds of sale, or follow the property into the hands of the purchaser, his trustee *de son tort.*

In *Oliver vs. Piatt, 3 How., 333, at p. 401,* Mr. Justice Story says :

"It is a clearly established principle in that (Equity) jurisprudence, that whenever the trustee has been guilty of a breach of the trust, and has transferred his property, by sale or otherwise, to any third person, the *cestuis que trust* has a full right to follow such property into the hands of such third person, unless he stands in the predicament of a
198 *bona fide* purchaser for a valuable consideration, without notice. And if the trustee has invested the trust property, or its proceeds, in any other property into which it can be distinctly traced, the *cestui que trust* has his election either to follow the same into the new investment, or to hold the trustee personally liable for the breach of trust. *This right or option of the cestuis que trust is one which positively and exclusively belongs to him, and it is not in the power of the trustee to deprive him of it* by any subsequent repurchase of the trust property. * * * *The option in such case to take the new or the*

original fund is therefore (as has already been suggested) exclusively given to the cestui que trust, and is given to him for the wisest purposes, and upon the soundest policy."

In *Storm vs. United States, 94, U. S. 83.*, Mr. Justice Clifford says: 199

"Where the defendant has actually received the consideration of a written agreement, it is no answer to an action brought against him for a breach of his covenants in the same, to say that the agreement did not bind the plaintiff to perform the promises on his part therein contained, provided it appears that the promises in question have in fact been performed in good faith, and without prejudice to the defendant. *Addison on Cont'r. 6th Ed.* 15; *Morton vs Barr, 7 Al. and Ell.* 25.

"Agreements are frequently made which are not in a certain sense binding on both sides at the time when executed, and in which the whole duty to be performed rests primarily with one of the contracting parties."

The agreement is not with Mr. Gorrill, who gave the notice, nor with Cad'r Jones, Jr., the Attorney, who 200 registered the agreement, but with "Col. Cad. Jones, of Hillsboro *as trustee*, claiming one-third of said mine, *as trustee* of Allan J. Davie, wife and children."

Under the circumstances a Court of Equity would probably have held Col. Jones justified in making this agreement, but it positively and exclusively belongs to the *cestui que trust* to question it, to elect whether to follow "the trust property or its proceeds" into the hands of the defendants, into which we have traced it, "or to hold the trustee personally liable." To confirm the transfer of the trust property and elect to 201 pursue their claim "against the several parties who have sold and received the purchase money, *instead of the land itself.*"

The defendants received the consideration of the agreement, the forbearance of Cad'r Jones to press his claim at the time, and thus to break up the advantageous sale they had made and to bring down upon them an action on their special warranty. They cannot now turn and say that he had no authority to enter into an agreement of the benefits of which they have availed themselves. 202

d.—The agreement thus made, an express trust.

The agreement recites the title of Peters, Sloan & Co. to one-third, the claim of Beckham to two-thirds, that Peters, Sloan & Co. had worked the mines for some time and paid

Beckham one-seventh of two-thirds of the gold extracted, the sale by Peters, Sloan & Co. of their interest for $82,333.33, and Beckham his own for $21,666.66, and his interest as
203 trustee at the same sum, the claim of Col. Jones to one-third, as trustee of Allen J. Davie, wife and children, the collection by Sloan, of Beckham's part, and the part of Mr. Bedon, the wish of all the parties "to receive the said several purchases *without prejudice* to the legal or equitable claim of Col. Cad. Jones," and then declares: (*p. 68, f. 161.*)

"*It is agreed that whatever claim the said Cad. Jones had in said gold mine he should have against the several parties who have sold and received the purchase money, each one being answerable to the rights and claims of said Jones out of the pur-*
204 *chase money instead of the land itself.*"

What was the effect of this agreement? It was an express trust that the parties who had received the purchase money would hold it, subject to whatever claim Col. Jones had in the mines, *each one* being answerable to his rights and claims, instead of the land itself.

Express trusts are thus defined in *Cook vs. Fountain, 3 Swan, 590.*

"All trusts are either first express, which are raised or created by act of the parties, or implied, which are raised or created by act of construction of law; again, express
205 trusts are declared either by word or writing, and these declarations appear either by direct and manifest proof, or violent and necessary presumption."

Perry on Trusts.

"§ 24. Trusts are divided, in reference to their creation, into express trusts, implied trusts, resulting trusts and constructive trusts. Express are also called direct trusts. They are generally created by instruments that point out directly and expressly the property, person and purposes of the trusts, and hence they are called direct or express trusts, in contradistinction from those trusts that are implied, presumed or construed by law."

Lewin on Trusts, p. 745.

206 "It is not necessary to use the word *trust* in ordet to create an express trust; but any language that would in equity raise or imply a trust, will be deemed an express trust."

Let us try the agreement by the rules: Col. Jones made claim, as recited in the agreement, as trustee for Allen J. Davie, wife and children. His claim was upon a trust. Here

there is an agreement "created by the act of the parties, raised and created by word (or) and writing." and "by direct and manifest proof, as well as "evident and necessary presumption," that whatever claim he had—and he had a claim 207
as trustee—he should have against the several parties who sold, and received the purchase money.

Certum est quod, certum reddi potest. The deed creating Col. Jones the trustee, was the "instrument" which created the trust they assumed, and pointed directly and expressly to the property, persons, and purposes of the trust." They agreed that the subject of the trust—the property—should be changed, that the purchase-money should stand instead of the land.

The word "trust" is not used in the agreement itself 208
only in the recital to the agreement. It was not necessary to be used. The language clearly "raises and implies" that they hold under the term of Col. Jones' trust.

For an instance of such trust see *Seymour vs. Freer, 8 Wall, 202*, in which the agreement was entered into between A and B for the purchase of land, A giving his time and attention to it, and B furnishing the capital; conveyance to be taken in B's name. B, the Court held, took the legal estate in trust for the purchaser specified, to which the statute of limitation has no application. 209

See to same effect North Carolina cases, *Jones vs. Person, 2 Hawks Law & Equity, 264; Falls vs. Torrence, 4 Hawks, 413; Blount vs. Robertson, 3 Jones, Equity, 75.*

In the case of *Park vs. Noble, 9 Rich (S. C.) Eq., 85*, land settled by marriage settlement, for the use of wife and, at her death, for children, sold by husband, who received the proceeds of sale. "Held, that husband was an *express trustee* to re-invest, or, at any rate, bailee of the proceeds, and agent to 210
invest, and in neither capacity was entitled to the protection of the statute of limitation against the claim of issue." And, in the case of *Buchanan vs. Jones, 1 Spear (S. C.), 282*, it was held that, if one place money or goods into the hands of another, upon an agreement that the bailee shall keep them

safely, and restore them when demanded by his bailor, it is a direct trust, to which the statute does not apply.

211 See also *Oliver vs. Piatt, 3 How., 333; Boone vs. Chiles, 1 Pet. 223.*

We do not believe that the 7th section of the statute of frauds, which prohibits the creation of a trust in lands, is of force in North Carolina, (*Foy vs. Foy, 2 Hawks, 131; Shelton vs. Shelton, 5, Jones Eq. 292*), and we might, therefore, establish entirely by parol the trusts in favor of the complainants. But we have, in fact, established the trust, as if the provision of that statute was in force in that State.

212 The rule in regard to the Statute is thus laid down in *Perry on Trusts:*

"§ 79. Wherever this Statute, or the substance of the Statute, is in force, express trust cannot be proved by parol. They must be *manifested* or *proved* by some writing signed by the party to be charged with the trust. They need not be created or declared in writing, *but only manifested or proved by writing*, for if there be written evidence of the existence of the trust, the danger of parol evidence, against which the Statute was directed, is effectually removed.

* * * * * * * *

"§ 83. * * *Nor need there be an actual subscription of the parties' name*, if the paper is authenticated by the party as his writing, for the purpose of declaring the trust by writing his initials. * * * *

213 It will be seen we have complied with the rule, had this provision of the statute been in force in North Carolina. The trust, in this case, was manifested and proved by writing. There is evidence of the existence of the trust. But the provision is not in force in this State, and we are permitted to establish the trust by parol, of which we have adduced abundant evidence, written and parol.

III.—STATUTE OF LIMITATIONS.

But it is said we are too late, and the defendants plead the Statute of Limitations. In considering this question, regard
214 must be had to the nature of the action, and of the relief

asked. The bill is one of the class technically termed a bill with *double aspect.* It seeks discovery, and upon discovery alternative relief—asks that the complainant may be allowed to elect to have either a partition of the land itself, or an 215
account, under the agreement, of the proceeds of sale, if sold. The defendants, by their answer, *discover* to the complainants the sale of the lands, and the receipt of them jointly with others of a large sum of money, the proceeds of sale. They say, (§ *VII., of Answer, p. 25, f. 55*):

* * * "On the 22d day of June 1853, Louis A. Beckham executed a deed to the defendant, the Belmont Mining Company, a corporation duly created, for two-thirds of the before described tract of land, and on the same day these defendants executed a deed to the defendant, the Belmont Mining Company, whereby they conveyed their undivided interest of one-third part therein to the said defendant, *and* 216
these defendants say, that they, together with the defendants, John Peters and James Sloan, jointly, received from the defendant, The Belmont Mining Company, the sum of eighty-two thousand three hundred and thirty-three dollars and thirty-three cents, and they are informed, and believe, that Louis A. Beckham received the sum of forty-three thousand six hundred and sixty-six dollars and sixty-six cents, from the defendant, The Belmont Mining Company."

Upon this answer the complainants elect to have an account of the proceeds of sale under the agreement, instead of the land itself, and the inquiry arises, what provision of the Statute of Limitations applies, and how, if at all? This should have been definitely pointed out by the appellees. We 217
should have been informed of the provision of the statute upon which they rely, and shown how it applies. But the defence is so indefinitely pleaded, that we are left to meet it under whichever provision they may ultimately seek protection, nor are we more assisted in the inquiry by the opinion of his Honor, who assumes the bar without pointing out the provision upon which he relies, (*p. 91, f. 224.*)

The consideration of the application of the statutes divides itself into two general questions. (1.) Has the statute *any* application to this case? (2.) If it has, what provision of it 218
applies?

I.—HAS THE STATUTE ANY APPLICATION TO THIS CASE?

a. As to express trust. We insist that the defendants are trustees of an *express* trust. In the agreement written by

Gilmer, their counsel, in the presence of Sloan, their managing partner, it is said (*p. 68, f. 161*):

219 "Whereas, it is the wish of all the parties for the said several parties to receive their said several purchases, without prejudice to the legal or equitable claim of Col. Cad. Jones.

"*It is agreed that whatever claim the said Cad. Jones had in said gold mine he shall have against the several parties who have sold and received the purchase money, each one being answerable to the rights and claims of said Jones out of the purchase money, instead of the land itself*"

This constituted Peters, Sloan & Co., who, their answer admits, and the agreement recites, received $82,333.33, but who, their own testimony and bank account show, received the whole purchase money (*p. 78, f. 186, p. 59*) and each of
220 them, trustees of the purchase money, subject to the rights and claims of Cad. Jones, in the place of the land itself, which rights and claims the agreement also recites, are as trustee of Allen J. Davie, wife, and children. We are at a loss to know what would constitute an *express* trust, if this does not.

To an express trust the statute has no application. *Lewin on Trusts, p. 739; Hill on Trustees, p. 263; Perry on Trusts, § 228; Angel on Lim., § 468; Boone vs. Chiles, 10 Pet., 223; Oliver vs. Piatt, 3 How., p. 333; Jones vs. Person, 2 Hawks Law & Eq. (N. C.), 269; Falls vs. Torrence, IV. Hawks., (N. C.),*
221 *413; Johnson vs. Overman, 2 Jones Eq. (N. C.), 182; Davis vs. Cotten, Ibid, 55; Collier vs. Poe, 1 Dev. Eq. (N. C.), 55; Blount vs. Robeson, 3 Jones Eq. (N. C.), 73; West vs. Sloan, Ibid, 108.*

b.—As to constructive trust. But if the agreement had not been made, the appellees and their copartners were trustees under a *constructive* trust. Their answer discloses the fact that they and other tenants sold the lands and appropriated the proceeds. This, independently of the agreement, constituted them constructive trustees, based upon a fraud. They claimed
222 but *one-third* of the land, and with notice of questions as to the title, which, at least, suggested an outstanding claim to *another one-third*, they join with Beckham, who had obtained the deeds he had under the most suspicious circumstances, and for inadequate consideration, in selling and making title to *all* the land, and taking and receiving *all* the purchase money.

The fact of the sale, and the reception by them of the proceeds, the defendants now, for the first time, *discover* to the complainants, and in doing so, they at the same time plead the shield of the statute. They inform us of the facts, and in the 223
same breath claim that we are barred by a previous knowledge of them. If the statute could have availed them, it is now settled that it could have been pleaded to the discovery. (*Dan'l Ch., Pl. & Pr., 730 ; Angel on Lim.*, § *295*.) It is surely inconsistent to answer our bill for *discovery*, and thereby to admit that we were *not* informed, and at the same time to plead the statute based upon our knowledge. (*Dan'l. Ch., Pl. & Pr., 817 ; Jesus College vs. Gibbs, 1 Y. & Coll., 145*.) The appellees' answer discovers to us the fraud, and the statute runs only in their favor from the discovery of the fraud. 224
(*Angell on Lim.*, § *470 ; Hill on Trustees, 265 ; Lewin on Trustees, 734 ; Perry on Trusts*, § *861*.)

But, it may be suggested, the appellants do not allege fraud in their bill. If we were endeavoring to establish fraud as the ground of our complaint, this would be properly urged. But our bill is for partition on account, and it will not do for the appellees to disclose to us a state of facts which constitute fraud, and then say we are barred, as the statute has run against, from the commission of the fraud.

The Courts of North Carolina have been very emphatic 225
upon this point. Taylor, C. J., in delivering the opinion of the Supreme Court, in *Jones vs. Person, 2 Hawks. Law & Eq. (N. C.), 269*, says, at *p. 290 :*

"There are many cases where a person, who is not a trustee originally, shall be construed such by a decree of a Court of Equity, founded on the fraud, and in such cases length of time will bar from the discovery of the fraud. *But it would be an absurdity that a fraud superadded to a trust should extinguish or merge it—that men should be encouraged to commit crimes as the certain means of eluding their contracts.*" 226

The general rule undoubtedly is, that where the trust is created merely by implication or construction of law, the plea of lapse of time will be more readily admitted as a bar to any claim by the *cestuis que trust* against the trustees. *Hill on Trustees, p. 265*. But as the same author goes on to observe :

"However, even in cases of *constructive trust* mere lapse of time will not of itself be always a bar to relief The party entitled to the benefit of the trust must also have been aware of his rights, and must have acquiesced in being deprived of them by the trustees, and time as a bar to the remedy runs only from the commencement of such ac-
227 quiescence. Therefore, where the parties, equitably entitled, have not been in a situation to become acquainted with their rights, the Court, in numerous instances, has enforced the performance of a constructive trust, notwithstanding the long interval that had elapsed since the title had accrued. Thus, in *Stackpole vs Davorem* (1 *Bro., P. C.*, 9), an account of rents and profits of an estate was decreed under peculiar circumstances of fraud and imposition after an adverse possession of *fifty years*. And in a recent case Sir C. Pepys. M. R., set aside a purchase by a steward at an undervalue after an interval of *forty-seven years*, and many other decisions of a similar tendency are to be met with in his books."

Perry on Trusts, § *228*.

In *Life Ass. of Scotland vs. Siddall*, *3 DeG. F. & J., p 74*,
228 Ld. Justice Turner says:

"Another question which arises in cases of this description is what amounts to *acquiescence?* Acquiescence, as I conceive, imports knowledge, for I do not see how a man can be said to have acquiesced in what he did not know, and in cases of this sort I think that acquiescence imports full knowledge, for I take the rule to be quite settled, that a *cestuis que trust* cannot be bound by acquiescence, unless he has been fully informed of his rights, and of all the material facts and circumstances of the case."

In *Falls and others vs. Torrence*, *IV. Hawks. (N. C.), 413*, Taylor, C. J., and Henderson, J., held, as by head note:

229 "And though the Court will not encourage claims brought forward after a great efflux of time, but will presume against them, yet where the delay is satisfactorily explained, and the presumption of satisfaction sufficiently removed, the equity of the claimant remains unaffected, and the Court will decree for them, notwithstanding the great length of time." * * * * * * * * * * *

In this case, Judge Henderson, at *p. 412*, says:

"We must, therefore, declare the rule to be, that *less than twenty years will not bar* an equity of redemption, *or an implied trust*."

In *Johnson vs. Overman*, *2 Jones Eq., (N. C.), 132*, *Pearson, C. J.*, says:

230 "The question is, does not the Acts of 1786 or 1825 apply to such a case so as to bar the right of the *cestuis que trust* to call for an account and settlement of the trust fund, after the expiration of two years, or to raise a presumption of satisfaction after the expiration of *ten* years?

"We confess the idea that the personal representative of a trustee may keep the trust fund in hand and bar the equity of the *cestuis que trust*, * * * * * * * * * * * unless it is called within *ten* years after their qualification, is entirely new one to us." * * * * * * * * * * * * *

And in *Blount vs. Robeson, 3 Jones Eq. (N. C.), 73,* the same learned jurist says, at *p. 79 :*

* * * * "It is a familiar doctrine, acted upon both at law and in equity, that when a confidential relation is established between parties, either by act of law, as in the case of copartners, *tenants in common, &c., or by agreement* of the parties as in the case of trust or agency, the rights incident to that relation continue until the relation is put an end to, and the Statutes of limitations and lapse of time have no application" * * * 231

In *Boone v. Chills, 10 Pet., 223,* this Court says: "What the reasonable time is within which a constructive trust can be enforced, depends upon the circumstances of the case, &c." And in *Oliver v. Piatt, 3 How., 411,*

"Another objection is to the lapse of time.—The mere lapse of time constitutes, of itself, no bar to the enforcement of a subsisting trust, and time begins to run against a trust only from the time when it is openly disavowed by the trustee who insists upon an adverse right and interest, which is fully and unequivocally made known to the *cestui qui trust.* * * * * * * * * That period (to wit., eight or ten years), upon admitted principles, *is far too short to interpose any positive bar to relief in equity.* There may have been an unjustifiable delay, and gross inattention on the part of some of the proprietors. But, as against persons perfectly cognizant of the trust, it can furnish no ground for any denial of the relief of which the case otherwise required." 232

In *Oliver v. Piatt,* a constructive trust was enforced after *nineteen* years. In *Boone v. Chills,* after *thirty* years. In North Carolina such a trust was enforced in *Jones v. Person,* 233 *3 Hawks Law Eq., 369,* after *thirty-five* years; in *Falls v. Torrence, 10 Hawks, 413,* after *thirty-seven* years, and in *Blount v. Robeson, 3 Jones Eq., 75,* a case in some respects analogous to that under consideration, after *thirty-five* years.

c.—As to bailees of the proceeds of sale.

If we have established our title to the *one-third,* we claim the appellees and others who sold, and who agreed to hold the proceeds of sale, subject to the rights and claims of Cad'r Jones, are at least *bailees* of such sale as to our one-third, and as such are not protected by the Statute.

In *Collier et. ux. v. Poe, 1 Dev. Eq., (N. C.) 57,* it was held: 234

"As to the statute limitation, relied on in the answer, there is no pretence for its operation, either in law or equity. The possession of the defendant was that of *a mere bailee,* notwithstanding his declaration that he claimed them as his own, he could not, of his own act, throw off his character of bailee."

See the same held in *Weeks v. Weeks, 5 Ired. Eq., 111*, and in *Konce v. Perry, 8 Jones Law, 58.*

235 The firm of Peters, Sloan & Co., having received the purchase money, and having agreed to hold it subject to the claims of Cad'r Jones, as a trustee, could not change the nature of his possession by mere words claiming the whole. They must have done something positively and unequivocally, as a refusal upon demand before their possession became adverse. This they did not do, and there is no pretence for the operation of the statute.

e.—As to tenants in common.

236 Our claim is for an undivided interest as *tenants in common* of land, and the agreement was that whatever claim Cad'r Jones had in the mine, he should have against the several parties who received the purchase money, "instead of the land itself." Our claim then is to be governed by the law of co-tenants in land. But as to co-tenants in land, it is well settled that the statute does not apply unless there has been some actual, distinct and definite ouster.

This rule is well recognized by the Courts of North Carolina.

Thomas vs. Garvin, 4 Dev. Eq. (N. C.) m., note at p. 225:

237 "The sole enjoyment of the property by one tenant in common, is not, of itself, an ouster of his co-tenants, the possession of one being the possession of all. But the sole enjoyment for a *great number of years* (*say* 21), without claim from another having right, and under no disability, becomes evidence, and raises the legal presumption of an ouster."

Northcotte vs. Casper, 6 Ired. Eq., (N. C.), 303, head note:

"Where one tenant in common has long been in the reception of the profits of the estate held in common, he is bound to account with the co-tenants for all his share of the profits received *no matter at what time* received, unless there is evidence of an ouster, or unless such tenant makes a demand, and there is a refusal. *In these latter cases, the statute of limitations begins to run from the time of such ouster, or such demand and refusal.*"

238 *Linker vs. Benson, LXVII. (N. C.) Rep., 150, head note.*

"Where a tenant in common of land has been in the sole reception of the profits *for more than seven years*, yet, without evidence to the contrary, it will be presumed that his original entry was permissive and under an assertion of his own claim and of his co-tenants, and no subsequent claim to the whole could make his possession adverse, without proof of *actual ouster.*"

His Honor, the District Judge, aware of this rule, thus endeavors to meet it. He says, *p. 90, f. 224 :*

" If the alleged deed of the plaintiffs was valid, they were tenants in common with McCulloch and H'y A. Davie. The 239
possession of one tenant is the possession of his co-tenants. The Statute of Limitation did not, therefore, begin to run *until* the purchase from F. W. Davie by Beckham, who then held adversely to the plaintiffs."

There is no evidence that Beckham entered upon the land at all. But if he had, it will be remembered that, as trustee under Hyder A. Davie's will (*p. 80, f. 191*), he had a right to do so, and under the case of *Linker vs. Benson*, his doing so was but an assertion of the claim under H. A. Davie's will which he undoubtedly had, and could not make his possession 240
adverse. Under the cases of *Thomas vs. Garvin* and *Northcotte vs. Casper*, there must have been some *actual* ouster. The mere purchase from F. W. Davie, if such had been proved (which it has not), would not have been sufficient, nor entry as we have just seen, nor the reception of profits for more than seven, nor indeed for twenty-one years. There must have been some demand and refusal. There was no refusal to the demand made on the 23d July, 1853. On the contrary, Peters, Sloan & Co. appear to have held the proceeds of sale subject to our claim until the agree- 241
ment, 28th April, 1854. But the cases establish a further condition, namely, that the co-tenants must be *under no disability*. The remaindermen having no right of action, were therefore not affected even by the demand.

f. As to copartners. But, as we have seen, co-tenants are to be regarded as copartners also (*ante*), and by the agreement, as whatever claim Cad. Jones had against the lands, he was to have against those who received the purchase money, his claim in the land being as co-tenant, was, therefore, as co- 242
partner also, and, under the ruling in North Carolina, a copartner is regarded as to partnership, assets as a trustee, in whose favor the statute does not run.

In *McNair vs. Ragland, 3 Murph. (N.C.), 139*, it was held, that when a partnership was dissolved, and by the terms of

the agreement the acting partner was to collect the debts, settle the business, the acting partner becomes a trustee for his former copartners, receive the money as such, and is liable
243 to pay when they require, and it is not until they require, and he refuses to pay that his fiduciary character ceases, and the Statute of Limitation attaches.

Peters, Sloan & Co. received the proceeds of the property of co-tenants in a mine, and therefore of copartners, and agreed that whatever the claim the appellants had, they should have against them instead of the land. They are liable to pay when required, and it was not until we called upon them, and they refused, *i. e.*, until the commencement of the suit, that their fiduciary character ceased, and the Statute of Limi-
244 tation applied.

Whether, therefore, the appellees are to be regarded as trustees of an *express* trust, or *constructive* trustees, bailees, co-tenants, or copartners, under each or all of which we submit they are liable, and our claim against them remains unaffected by the Statute of Limitation.

2. If, however, the Statute of Limitations has any application to this case, when, how, and what provision of it applies?

245 The defendants, in setting up this defence, say, that if they have committed *any trespass* on the rights of the complainants, the *cestuis que trust* of Jones, that Jones, the trustee, could have brought an action, and that, as he did not, the complainants are barred, (*p. 26, f. 28*); and his Honor, the District Judge, holds, that if the Statute barred the rights of the trustee, it also bars the rights of the *cestuis que trust*, (*p. 90, f. 224.*) The defendants also plead, that the cause of action did not accrue within three years from the commencement of the action.

In considering when the Statute commenced to run against
246 the appellants, (if it did at all), three points are to be considered, (*a*), that fixed by his Honor, Judge Dick, the date of the deeds to Beckham, 2d March, 1850; (*b*), the date of the agreement, 28th April, 1854; (*c*), the date of the accruer of

the rights of the appellants, the *cestuis que trust*, which, as we shall show, is to be taken as of the 1st, December, 1858.

a. The date of Beckham's deeds, 2d March, 1850. That his 247
Honor erred in fixing this date as the time at which the Statute would commence to run, we think will appear from the authorities we have just cited. Our claim is, that, of co-tenants, as between whom the Statute does not run unless there has been an *actual ouster*, of which the exclusive reception of profits even for twenty-one years affords no evidence. *Thomas vs. Garvin; Northcote vs. Casper.* The purchase by Beckham, if such had been proved, (which it was not,) would not be sufficient to start its operation; there must have been *actual ouster*, of which Beckham's entry could 248
not, if proved, (which it was not), afford evidence, for, as he had an undoubted right to enter as trustee, under Hyder A. Davie's will, his entry would have been presumed as only under an assertion of that claim; *Linke vs. Benson.* We think we may safely discard this date.

b. The date of the agreement, 28th April, 1854. We maintain, that the agreement constituted Peters, Sloan & Co. trustees, upon an express trust, in whose favor the Statute does not run. But his Honor thinks this agreement not binding as to the defendants, for the reason, that it is not of mutual 249
obligation; that, as the trustee, by the express terms of the deed, could not sell the land, except by the consent of Allen J. Davie and F. W. Davie, and that, as he was bound to convey it to the plaintiffs upon the death of Allen J. Davie and his wife; that any other disposition of the land was inoperative and "a breach of trust, of which the defendants had constructive notice." But we again ask, is it not for just such a breach of trust as his Honor says this was, that the *cestuis que trust* are allowed in Equity to follow their trust property? Would it not be monstrous to allow parties to deal with a trustee to 250
contract with him, and then, after having realized the benefit of the agreement, to say to the *cestuis que trust*, that the trustee had no right to make the contract? It is upon this very Equity that our claim is based. It rests with the appellants,

the *cestuis que trust* alone, to repudiate or adopt the agreement of their trustee, to go against the land or against the parties, who received the purchase money, and agreed that
251 they should be liable, *instead of the land*, to our claims? It is this which we asked to be allowed to elect, and having elected, the defendants, appellees, are bound by our election.

But at the date of the agreement the appellants had no right of action against any one. During Allen J. Davie's life and until his death, he was to receipt to the trustee for the rents and profits, and the trustee was only to convey to his children, at his death, (*p. 66, f. 157.*) Until they could show his death, therefore, or until the law presumed it, the appellants had no right of action, and the Statutec ould not run
252 against them. *Pratt vs. Pratt, 96 U. S., 104.*

c.—The date of the accruer of the rights of the appellants. His Honor says that if the Statute barred the rights of the trustee to sue, it barred also the *cestui que trust*, for whom he held the land, and cites *6 Jones Eq. 328.*

Such is no doubt the general rule, but we submit it is subject to this qualification, to wit: *that the cestuis que trust are under no disability, and that they have an immediate possessory title to the beneficial interest.*

253 Ch. J. Pearson, in delivering the opinion of the Sup. Court in the case cited by his Honor, *Herndon vs. Pratt, 6 Jones, (N. C.) 328*, did undoubtedly declare the rule to be as Judge Dick has held. This Court pays great respect to the construction of State statutes by State Courts, and will rarely differ from their settled construction, but such construction to control the Court must be a *uniform* and *settled* construction. *Townsend vs. Todd, 1 Otto, 452.* Nor will it blindly follow even such. *Jackson vs. Lamphire, 3 Pet. 280; Rowan vs. Runnells, 5 How. 138; Pease vs. Peck, 18 How. 595; Gelpecke vs. City Dubuke, 1 Wall, 176.* Nor in matter of common law does it yield its
254 judgment to State tribunals, *Foxcroft vs. Mallett, 3 Sum. 153; Sheely vs. Guy, 11 Wheaton, 361*, and regards the English Statutes, which have been incorporated into the law of our State as the common law. *Pennock & Sellers vs. Dialogue, 2 Pet. 19; Calcheart vs. Robinson, 5 Pet. 279; Sheely vs. Guy,*

Sup.; (See Post.) The case of *Herndon vs. Fratt*, we think we shall show is not consistent with that to which it refers, *Wilborn vs. Finley*, 7 *Jones Law*, (*N. C.*) *228*, but if it were, by the authorities we have just quoted, we are free to ex- 255
amine it.

In delivering the opinion, Ch. Pearson says:

"The principle that, when the Statute of Limitations is a bar to the trustee, it is also a bar to the *cestui que trust* for whom he holds the title, and whose right it is his duty to protect, is settled. *Welborn vs. Finley*, Jones' Law, 228. In delivering the opinion in that case, the principle was considered so plain that it was deemed unnecessary to cite authorities; and the Court was content to leave the question on the manifest reason of the thing. * * * * The question, however, having been discussed at the bar, we will now refer to *Lewin on Trusts*, 24, *Law Lib*, 306, and the cases there cited, which will warrant the conclusion that the doctrine is settled." 256

As, however, the question *was* discussed at the bar by the distinguished counsel in *Herndon vs. Fratt*, we will not be considered presumptous in renewing the discussion before this Court. Let us look at *Welborn vs. Finlay*, to which the Chief Justice refers. It appears to have been a case of equitable claim to land, but upon an examination it does not bear out the broad rule declared by the Chief Justice in the later case of *Herndon vs. Pratt*. We quote the passage from the opinion in *Welborn vs. Finlay*.

"*If one create a particular estate, say for life, or for years, and the estate of the particular tenant be divested, and the right of entry tolled by an adverse possession of seven years, under color of title, after the termination of the particular estate the reversioner will have the right to enter by force of his original estate* because the right of entry did not accrue until the particular estate determined, and the Statute did not begin to run against him before the right of entry accrued, and it is clear that after the entry of the particular tenant was tolled he could not by a surrender of his estate put the reversioner in a better condition than he was himself, for he had no estate to surrender, and consequently the reversioner would have no right of entry until he acquired one by force of his original estate." 257

This is the rule for which we contend, viz: that the reversioner did have the right to entry by force of his original estate, because the right of enter did not accrue until his 258
particular estate determined, and the Statute did not begin to run against him before his right of entry accrued. The rule is thus explicitly stated in *Gwyn vs. Welborn*, *1 Dev. & Batt. Law* (*N. C.*) *at p. 351*, by Gaston, J.

"The Statute excludes and disables from entry such persons as fail to enter within seven years after their right or title shall have accrued. The ouster of a tenant for years, under the claim of a fee by a stranger, is said in the books to be a *disseisin* of him in reversion or remainder. Whether it is to be so regarded in our country, where an
259 ejectment is the *only* remedy, or the only remedy in use for trying title, may be a question worthy of consideration But however this may be, the reversioner during the continuance of the prior estate has no right of *possession* to the land, and cannot therefore have a right to enter thereon. *Orrell vs. Maddox, Runnington on Ejectment, Appendix*, 1., *Doe ex dem ; Cook and Danvers*, 7 *East. Rep.* 299. *As his right of entry arises upon the expiration or extinguishment of the term, he has seven years thereafter to assert it, and until these seven years expire he is not within the bar of this Statute. See Preston in Abstracts* 351 "

The same was again held in *Caldwell v. Black, 2 Ired. (N. C.) 463.*

260 "But although a tenant for years may be barred by the Statute of Limitations, yet the reversioner will not be effected thereby, until the expiration or extinguishment of the term."

And again, in *McLane v. Moore, 6 Jones, (N. C.) 320*, where an estate in land was limited to one for life, in the remainder to a woman who married during the life estate, it was held she was not barred by seven years adverse possession after termination of the life estate. The weight of the authority therefore in North Carolina is clearly against the position of his Honor.

But let us look at the authority to which C. J. Pearson
261 referred in *Herndon v. Pratt.* Upon reference to the edition of *Lewin on Trusts*, quoted by the Chief Justice, *22 Law Library, 306, (Ed. 1839,)* we find that after a review of the three cases, which up to that time had been decided, to wit: *The Earl v. The Countess of Huntington*, and *Wych v. The East India Company, 3 P. Wm., 309*, on the one side, and *Allen v. Sayer, 2 Vernon, 468*, on the other, he concludes his paragraph upon the subject with the cautious remark:

"Perhaps therefore we *may venture* to conclude that an infant *cestuis que trust* where there is no imputation of fraud, will be barred by a legal bar incuraed through the laches of the trustee."

262 But in the case of *Allen v. Sawyer*, cited by him at length and added in full as an appendix, the contrary doctrine is held, and in a note to the report of the case of *Wych v. The East India Co., 3 P. Wm., 309, (4 Am. Ed., 1824,)* it is said:

"In the case of *Earl v. The Countess of Huntington, Hill*, 1719, the Lord Chancellor Parker *was of opinion, but did not then determine the point*, that a fine and five years *non claim* should in favor of a purchaser, bar a trust term, though the *cestui que trust* was an infant."

The authorities then at the time of the edition of Lewin, 263
quoted by C. J. Pearson, were very uncertain, and the author would only say, "perhaps we may venture to conclude," that an infant *cestui que trust* would under such circumstances be barred. And so in Hill, in an edition of about the same time, reviewing the same authorities, says it seems still somewhat doubtful how far the infancy of the *cestui que trust* will prevent the adverse possession of a stranger from operating as a bar to their claims, (*p. 268.*)

But Lewin in his later editions leaves out entirely the
sentence we have quoted, and in that of 1857 says that the 264
principle in *Wych v. East India Co.*, is impliedly contradicted by the Statute of Limitation, *3 and 4, Wm. 4, C. 27, S. 24*, which appears to assume that the trustee and *cestui que trust* have distinct rights of suing, and at at *p. 745*, he says if the *cestui que trust* be a remainderman, the trust it seems will not run until the remainder falls in possession, and in his latest edition, (6th London, 1875,) says at *p. 718*, that the decisions and dicta point to the conclusion that a *cestui que trust* who is a remainderman, or under disability is entitled to the full statutory period from the accruer of the right in possession 265
or from the cessor of the disability, as the case may be, and cites for authority: *Thompson v. Simpson, 1 Dru. & War, 489; Commissioners of Donations v. Wybrants, 1 Jno. & Lat., 182; Attorney-General v. Magdalen College, 18 Beav., 239, 250; Life Association v. Sidall, 3 DeG. F. & J., 69.*

In the case of *Attorney-General v. Magdalen College*, just cited, Sir John Romilly, M. R., says:

"It is very necessary however, to keep in view the distinction between the trustee and the *cestui que trust*. The trustee would in any case under the Statute be barred from recovering the land after twenty years had elapsed, but the *cestui que trust* would 266
not be barred until the time prescribed by the Act had elapsed after he could have maintained a suit in equity, and accordingly, Lord St. Leonard's in the case of the *Attorney-General v. Persee*, * * * determined that time does not run against the *cestui que trust* until there is some person in existence who is entitled to claim. And it follows from the decisions, that even then as against that person himself, the limitation does not begin to run unless and until he is free from disability."

So, too, in *Bennett vs. Colley, 2 Mylne & Keen 225, and 5 Sim 181*, it was held that the statute does not begin to run against one until he have an immediate possessory title to the bene-
267 ficial interest. Also, to the same effect, *March vs. Russell, 2 Mylne & Craig 31*, and in *Life Association and et. vs. Sidal 3, DeG. F. & J. 58*, Lord Justice Turner held that a *cestui qui trust*, whose interest is reversionary, is not bound to assert the title until it comes into possession. See, also, *Earl of Brandon vs. Becher, 3 Clark & Finnelly, 470; Burrows vs. Gore. vi., H. L. Cases (Am. Ed. 1870).*

Hill on Trustee, p. 266.

"Moreover, a *cestui qui trust* will not be barred from his rights of relief by any length of acquiesence, *unless he have an immediate possessory title.*"

268

Ferry on Trust, §358.

"But it would seem that if the *cestui qui trust* is entitled to an interest in remainder only, *the statutory bar ought not to begin to run until his interest falls into a right to the posesssion of the beneficial or equitable interest.*"

Angell on Limitations.

§468. "The intervention of a particular estate, however, will suspend the operation of the statute so as to preserve the remedy of the persons under disability, where, otherwise, it would have been lost"

And, finally, this Court, at the last term, acknowledged the
269 rule in *Platt vs. Platt, 96 U. S. 704*, holding that the statute does not begin to run until there is a right of entry, or of action, against the party in possession.

We think, then, we have shown that the weight of authority, at present, is altogether against his Honor, upon this point, and in favor of the *cestui qui trust* until he has an immediate possessory beneficial interest, until the remainder falls in, and until he is free from all disability.

By the deed under which the appellants claim, Cadwallader Jones was to permit Allen J. Davie, his wife and children, to
270 receive the rents and profits during the lives of Allen J. Davie and wife, and, at their deaths, to convey the premises to their children (*p. 67, f. 158*). It is admitted that Rosa L. Dane, one of the life tenants, died in 1843, and that the time of the death of the other, Allen Jones, is not known; that he was last heard from in the Fall of 1851—say December 1, 1851—

(*p. 80*). The presumption of his death, then, would arise on the first of December, 1858,

The rule is thus stated in *Greenleaf on Evidence. vol. 1, §41* (*Red. Ed.*). 271

* * * .. "When, therefore, the existance of a person * * * is once established by proof, the law presumes that the person * * * continues to exist, as before, unil the contrary is shown, or until a different presumption is raised from the nature of the subject in question. Thus, where the issue is upon the life or death of a person once shown to have been living, the burden of proof lies upon the party who asserts the death. But, after the lapse of seven years, without intelligence concerning the person the presumption of life ceases, and the burden of proof is devolved on the other party." * * * *

In *Moffatt vs. Varden, 5 Cranch, C. C. P., 63*, it was held analagous to the statute of bigamy—that the presumption of 272 death arises after seven years since the party has been heard of."

In *Craig vs. Craig, 1 Bailey, Eq. (S. C.), 105*, Ch. Harper remarked: "Not having been heard from, he would be presumed dead *after* seven years."

In *Spencer vs. Roper, 13 Ired. Law, (N. C.) 334*, it is said that where a party has been absent seven years, without being heard of, the only presumption arising is that he is *then* dead. There is none as to the precise *time* of the death.

See also authorities on the subject reviewed, *In Phene's* 273 *Trust, L. R., 5 ch., app. 139*; and the statement of the rule in *Stephens' Digest of Evidence, Article 99.*

The Statute of Limitations did not commence then to run against the appellants, if at all, until the death of Allen J. Davie, which is now only a presumption of law, and as such may be fixed on the 1st December, 1858.

e. Suspension of the Statute by the war. But the war came on and the running of the Statute was thereby suspended, *ipso facto; Delaney vs. McKeen, 1 W. C. C., 354; Jackson vs.* 274 *Stewart, 15 Am. L. R., 732;* and by express enactment of Congress. *Stat. U. S., 11 June, '64; 13 Stat., 123, Stewart vs. Kahn, 11 Wall., 493; U. S. vs. Wiley, Ibid., 508:* and in the case of *McNair vs. Ragland, 1 Dev. Eq., 540.* Ruffin, J. says:

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"A delay thus accounted for by the course of public events, cannot be construed into an abandonment or satisfaction of the plaintiff's demands.

The time for the commencement of this suspension of the
275 Statute has been fixed by this Court for the State of North Carolina, on the 27th April, 1861. *The Protector, 12 Wallace, 702*, and by express enactment of the State of North Carolina continued to the 1st January, 1870.

In *Platt vs. W. N. C. R. R. Co., LXV. N. C. R., 181:*

"The statute of limitation was suspended in the State from 11th May, 1861, to the 1 January, 1870, and hence a prior contract, which was not barred by the said statute, on the said first mentioned date, could not have been so prior to 1st day of January, 1870."

Williams vs Williams, LXX., N. C. R., 189, head note:

276

"In the action on account, due 1st January, 1861, to which the statute of limitation is pleaded, the time during which the statute is to run must be computed from the said 1st day of January, to the 20th day of May, 1861, and then from the 1st day of January, 1870, till the day the summons was issued."

See also *Johnson vs. Winston, LXIII., N. C. R., 552.*

The Statute, then, in our case ran, if at all, against such of the appellants as were under no disability from the 1st December, 1858, to the 27th April, 1861—that is, *two* years, *four* months and *twenty-seven* days, and from the 1st January,
277 1870, to the 18th July, 1874; that is, *four* years, *six* months and *eighteen* days—in all, *six* years, *eleven* months and *fifteen* days.

f. Suspension of Statute by disabilities. But the Statute was still further suspended by the minorities and covertures of the appellants. *Allen vs. Gentry 2 Car. L. R, 609*, cited in *Iredell's Digest, 2 Vol., 542, 656.*

"Where the wife was an infant when the act of 1806 (relative to parol gifts of slaves) began to run, and became covert during her infancy, the act cannot be set
278 up against a suit brought by her husband."

And in *Gilliam vs. Jacobs, 4 Hanks, N. C., 310*, was held that where the right of land devolved in an infant who died before the disability was removed, leaving an infant heir, and his infant heir became *covert* before full age, and brought her action within three years after discoverture, she is not bound

by the Statute of Limitations, but comes within the saving of the Act.

As appears by the *memoranda* in relation to the family admitted (*p. 79, f. 189*): 279

1. Of the appellants, the first four named were minors before, and none of them came of age until during or after the war, to wit: William R. Davie came of age, 15th June, 1864 Mary F. Woolf, 5th September, 1866; John M. Davie, 24th October, 1868, and Allen J. Davie (son of William R.), 31st April, 1871. The statute, therefore, has only run against the first three since 1st January, 1870, to wit: *four years, six* months, and *eighteen* days, and against the fourth since the 31st April, 1871, to wit: *three* years, *two* months and *eighteen* 280 days.

2. Allen J. Davie, of Oregon, was of age under no disability, hence the statute commenced to run against him (if at all), 1st December, 1858, to wit: *six* years, *eleven* months, and *fifteen* days.

3. Mrs. Burton was under coverture prior to 1854, and has so continue to the present time, the statute, therefore, cannot be set up against her.

4. Mrs. McKenzie was under coverture from 1856 to 1861, so that the statute did not begin to run against her until 1st 281 January, 1870.

5. Mrs. Evans was unmarried, and of age, so that the statute commenced to run against her (if at all), 1st December, 1858, and her subsequent coverture occurring only during the suspension of the statute, it has run (if at all) *six* years, *eleven* months, and *fifteen* days.

6. Mrs. Huggins was under coverture from 1854 to 1858, and so the statute only ran against her (if at all) since 1st January, 1870, to wit: *four* years, *six* months, and *eighteen* days.

7. Mrs. McCrady was a minor in 1858, and remained so 282 until and after the suspension of the statute, since which she has been under coverture, and hence protected against the running of the statute.

8. Thomas W. Davie was a minor in 1858, and remained so until and after the suspension of the statute, and so it did

not begin to run against him until 1st January, 1870, and has run (if at all) *four* years, *six* months, and *eighteen* days.

283 *g.—Suspension of the statute as to parties "beyond seas."* "But there is another suspension of the statute which applies to all the appellants. By the admitted *memoranda* in relation to the family, it will be seen that none of them have resided in the State of North Carolina for *thirty* years past, and as we shall see, when we examine the term of the statute, that is, in each instance a provision in favor of persons "*beyond seas.*"

By the general and almost universal interpretation of these words, "*beyond seas,*" both in England and in this country, they are held to mean out of the limits of the State. There
284 are, however, two decisions in North Carolina, but the opinions in both, delivered by the same Judge, restricting the interpretation, and confining it to its literal meaning, beyond the ocean. *Whitlocke vs. Walton, 2 Murphy, 23, and Earle vs. McDowell, 1 Dev., 16.*

It behooves us, therefore, in sustaining ourselves at all points, as we are called upon to do, to show that this Court should not be bound by these cases.

As is well known, these words, "beyond seas," have been taken from the statute (*21 Jas., 1 Ch., 16*), and appear in
285 nearly all the Statute of Limitations of the States of the Union, and perhaps no words have been so often construed, and none have received more generally the same construction. The Courts of the United States, as we have before observed, regard the English statutes incorporated into our laws very much as the common law, which they claim the right to construe, according to their own judgment.

In *Pennock & Sellers vs. Dialogue, 2 Pet., 19,* Mr. Justice Story, in speaking of the Statute of Frauds, says:

"The words of our Statute are not identical with those of our Statutes of Laws, but
286 it can scarcely admit of doubt that they must have been within the contemplation of those by whom it was framed *as well as the construction put upon them* by Lord Coke.

And in *Cathcart vs. Robinson, 5 Peters, 279,* Ch. J. Marshall says of the statute, 27th Elizabeth:

The received construction in England the time they (British Statutes,) are admitted to operate in this country, indeed to the time of our separation from the British Empire, may

very probably be considered as accompanying the Statutes themselves and forming an integral part of them."

In *Shelly vs. Guy, 11 Wh., 361*, the point was discussed in relation to the very words of the statute we are now considering. The case came up from Tennessee, in which the North Carolina statute was in force, and Mr. Justice Johnson says: 287

"This Court has uniformly manifested its respect for the adjudication of the State tribunals * * Yet in a case like the one now occurring, it cannot acknowledge the objection to go farther at present than to examine the decisions formerly rendered in the construction of these words.

"We have reflected and heard argument on our former decision, and no doubt has been entertained except on the question, how far we are bound to surrender our construction under the actual state of difference existing between our construction and that of the State from which the cause came."

288

The Court held in the case, that the terms "beyond seas" are to be construed as equivalent to without the limits of the State where the statute is enacted.

In *Jackson vs. Lamphire, 3 Pet., 289*, the Court say in regard to the Statutes of Limitation:

"Cases however may occur when the provisions of the law on these subjects may be so unreasonable as to amount to a denial of right, and call for the interposition of the Court."

See *Angell on Limitation*, §22, citing and commenting on this case. 289

What then is the general construction of these words, "beyond seas?" In *Ruckmaboye vs. Mottichund, 32 Eng. Law and Eq., 84*, before the Privy Council, the history of their construction was reviewed by Ch. J. Jervis, who shows that they have been used in many statutes, and from the earliest times in England, and that they were well known to the common law before the enactment of statute. He says, *p. 90.*)

"The words 'beyond seas' are of extensive application in the law, many ancient rights being saved by the common law to persons beyond the seas, it is therefore of considerable importance to ascertain what has been deemed to be the legal import and meaning of them. because if it shall appear that they have long been used in a sense which may not probably be called technical, and have been judicially construed to have a certain meaning, and have been adopted by the Legislature in that sense long prior to the Statute of 21, Jac. 1, c. 16, the rule of construction of statutes require that the 290

words in the Statute should be construed according to the sense in which they had been so previously used, although that sense may vary from the strict literal meaning of them."

291 The Privy Council held that the words "beyond seas," are to be understood as of old in legal import and effect synonymous with the words "out of the territories," "out of the realm," "out of England," and one not to be interpreted literally.

Lord Holt held that Dublin, or any place in Ireland was "beyond seas," and following the English decisions it may now be considered as an established general rule that in this country "beyond seas," and "out of the State," are synonymous expressions, and must have the same meaning. *Angell*
292 *on Limitation*, §200.

This construction has been given by this Court. *Murray vs. Baker, 3 Wh. 541; Shelly vs. Guy, 11 Wh., 361; Bank of Alexandria v. Dyer, 14 Pet., 441;* by the Circuit Courts (U. S.) in Massachusetts, *Lee vs. Cassin, 2 Cr. C. C., 112*; in Michigan, *Pease vs. Peck, 5 McL., 486;* in Delaware, *Ferris vs. Williams, 1 Cr. C. C., 475*; by the State Courts: in New York, *Ruggles vs. Keeler, 3 Johns., 267;* New Hampshire, *Gulersha vs. Cobleigh, 13 N. H., 79;* Connecticut, *Hatch vs. Sofford, 24 Con., 432, a p. 441;* Ohio, *Whitney vs. Webb, 10 Ohio, 513;* South
293 Carolina, *Forbes vs. Foot, 2 McCord, 331;* Maryland, *Brent vs. Tasker, 1 Har. & McHen., 89, Penoast vs. Addison, 1 Har. & Johns, 350;* Georgia, *Denman vs. Holman, 26 Ga., 182.*

Angell on Limitations gives instances of two States in which the term "beyond seas" is construed to mean without the limits of the United States, viz: Pennsylvania and Tennessee. He does not mention North Carolina.

The weight of authority is clearly then for the construction "*out of the State*," and not "*out of the United States.*" The Courts of Pennsylvania are doubtless entitled to great con-
294 sideration, but this Court, as we have seen, was not prepared to surrender its construction on the point to that of the Courts of Tennessee, nor will it do so, we apprehend, to the authority of the two cases in North Carolina, though supported by decisions in Pennsylvania.

f. What provision of the Statute, (if any,) applies to the case? It only remains now to inquire what provision of the Statute applies, if the Statute is applicable at all to the case.

The appellees plead, that if they have committed *any tres-* 295
passes, that the appellants are barred, because the causes of action did not accrue within *three years* from the commencement of this action. We gather, therefore, though it has never been distinctly declared, that they rely upon the fourth section of the chapter of the Revised Statutes, in relation to limitation upon trespasses and accounts. But to this section there is this *proviso—Revised Code of N. C., 1855, chap. 65:*

"§ 4. And provided further, that if any person or persons that is or shall be entitled to any such action of trespass, * * * action of account, and upon the case, * * * * * be, or shall be at the time of any such cause of action given or accrued, 296
fallen or come within the age of twenty one years *feme covert, non-compos*, imprisoned, or *beyond seas*, then such persons shall be at liberty to bring the same actions within such times as are before limited, *after coming to or being of full age*—discovert, of sound memory, at large, or returned from *beyond the seas*, as other persons having no such imprisonment might have done."

The commencement of the suit is a constructive return; *Yoast vs. Willis, 9 Ind., 549;* so that, if this provision applies, all the defendants are within this saving clause, as it appears by the *memoranda* in relation to the family of Allen J. Davie, that none of them have resided in the State for thirty years 297
past.

But we submit, this is not the provision which applies, (if any), to this case. Our claim is as co-tenants of land, and under the agreement by which those who received the purchase money, agreed that, whatever claim we had against the land, we shoul l have against them. We cannot, therefore, be barred until we would have been barred as against the land. The following is the provision in relation to claims against land:

298

Revised code of 1855, Chap. 65.

Section 1. Be it enacted etc, That no person or persons, nor their heirs, which hereafter shall have any right or title to lands, tenements, or hereditaments, shall thereunto enter or make claim, but within *seven years next after his, her, or their right or title descended or accrued, and, in default thereof*, such person or persons so not entering or making claim shall be utterly excluded and disabled from any entry or claim

thereafter to be made; *provided, nevertheless*, that if any person or persons that is, or hereafter shall be, entitled to any right or claim of claim tenements or hereditaments, shall be at the time the said right or title first descended, accrued, come, or fallen, *within the age of twenty-one years, feme covert, non compos mentis*, imprisoned, or
299 *beyond seas*, that then such person or persons shall and may *notwithstanding the said seven years be expired*, commence his, her, or their suit, or make his, her, or their entry, as he, she, or they might have done before their act, so as such person or persons shall, *within three years next after full age, discoverture*, coming of sound mind, enlargement out of prison, or *persons beyond seas, within eight years* after the title or claim becomes due, take benefit and sue for the same.

The title to the land certainly did not accrue to the appellants until the death of Allen J. Davie, and his death was only presumed by the law, and is to be taken as of 1st December, 1858. Then, only, could the appellants have made entry, or commenced suit, had none of them been
300 under disability. The statute, then, if it ran at all, commenced to run against them at that date—1st December, 1858. But it was suspended by the war, on 27th April, 1861. It had run, then, *two* years, *four* months, and *twenty-seven* days. It commenced to run again on the 1st January, 1870, and had *six* years, *seven* months, and *three* days before it expired, which would have given the appellants, had they been natives of the State, and under no disability, until the 3d August, 1874. The subpœna was issued on the 18th July, 1874; so the appellants were, under the strict letter of
301 the statute, within time. But, as they were all "beyond seas" when their titles accrued, they all had, independently of disabilities, *eight years*, that is, another year within which to bring their action.

This would have been the limit to our right of action had the case stood only upon our legal right to the land, but our case is stronger. We rest it upon the equity to follow the fund derived from the trust property into the hands of the appellees, who sold it, and upon the agreement of the 28th April, 1854, and submit that the limit to our right of action
302 is only to be found (if at all) in the two following sections of the Statute (*Revised Code of 1855, Chap. 65*).

"Sec. 13. The presumption of payment or satisfaction on all judgments, *contracts and agreements* heretofore had or made, or hereafter to be had or made, shall arise within (*a*) *ten years after the right of action on the same shall have accrued, or shall accrue*, under the same rules, regulations, and restriction as now exist as law in such cases.

SEC. 14. The presumption of payment or abandonment of the right of redemption on mortgage *and other equitable interest*, shall arise within (*b*) ten years after the forfeiture of the said mortgage, or last payment on the same. *or the right of action shall* 303
accrue, on any equitable interest or claim under like rules, regulations, and restriction &c., &c., &c.

There is no presumption of the satisfaction of the agreement into which the appellees entered on the 28th April, 1854, until *ten years after* our right of action on the same accrued.

(*a*.) Marginal note to this section, "Judgments, &c., presumed paid *after* ten years."

(*b*.) Marginal note to this section, "Rights of mortgagor or mortgagee presumed 304
settled *after* ten years."

Edward McCready

APPENDIX.

Acts of North Carolina relating to Registration.

Revised Code, Chap. 37—Deeds and Conveyances.

305 Battle's Revisal, Chap. 35—Deeds and Conveyances, 351.

"No conveyance of land shall be good and available in law unless the same shall be acknowledged by the grantor, or proved on oath by one or more witnesses, in the manner heretofore directed, and registered in the County where the land shall lie, within two years after the date of the said deed, and all deeds so executed shall be valid, and pass estates in land without livery of seizure, attainment, or other ceremony whatever."

Laws of N. C., 1852, p. 572:

306 AN ACT *to extend the time for Registering Grants, Mesne Conveyances, Powers of Attorney, Bills of Sale, and Deeds of Gifts.*

SEC. —. "*Be it enacted, &c.*, That all grants of land in this State, all deeds of Mesne Conveyance, power of attorney under which any lands, tenements, or hereditaments have been or may be conveyed, all powers of attorney which are required to be proved and registered by any Act of the General Assembly, all bills of sale, deeds of gifts, already proved,
307 shall and may, within two years after the passage of this Act, be admitted to registration, as heretofore appointed by law; and said grants, deeds of Mesne Conveyance, powers of attorney, bills of sale, and deeds of gifts, shall be as good and valid as if they had been proved and registered within the time heretofore allowed: Provided, That nothing herein contained shall be construed to extend to mortgage and conveyance in trust, or manage settlements." *a.*

a. NOTE—A similar Act, extending the time for registration, has been passed by every subsequent Legislature. See *Hill vs. Jackson*, 9 *Ired.*, 331; *Isler vs. Foy*,
308 *LXVI N. C.*, 551, *ante p.* 23, 24.

Nov 22. 78. Atty N. H. Swayne

Supreme Court of the United States.

OCTOBER TERM, 1878.

No. 82.

WILLIAM R. DAVIE, AND OTHERS,

vs.

B. F. BRIGGS, AND OTHERS.

BRIEF FOR THE APPELLEES, M. L. AND R. J. HOLMES.

The bill in this case was filed upon the 11th of July, 1874.

The case stated by the plaintiffs is:

That one F. W. Davie, upon the 15th day of January, 1833, conveyed to one Cadwallader Jones an undivided third in a certain tract of land lying in Guilford county, North Carolina, in trust for one Allen J. Davie, his wife and their children, (then born or thereafter to be born,) during the life of said Allen, and upon his death in trust for his wife and their children during the life of such wife, and upon the death of the wife, then in trust to convey such land to the said children:

That one Beckham, who claimed two thirds of the same land under deeds obtained from said F. W. Davie during his last illness, (he died April 9, 1850,) sold or leased certain interests in such land to the defendants, Briggs, Peters, Sloan, M. L. Holmes, and R. J. Holmes, who entered as

tenants in common with the other owners of the land, and worked a gold mine thereupon for several years;

That said Beckham and his assignees afterwards sold their interest in the land to the Belmont Company, and that still later the Belmont Company resold it to the McCulloch Company.

The relief sought is on account of the profits made in mining, and for partition; and if the lands have been sold, then for a share in the purchase money, &c., and for further relief.

Upon the plaintiffs' evidence it appears that Allen J. Davie died in the year 1851.

He was never heard of after December in that year, when certain companions of his, in a trip to California, undertaken overland, returned, reporting that they had been stopped on their way by hostile Indians, and that they had left Mr. D. resolved to fight his way through. In the bill a belief of his death at that time is stated, (folio 6,) and this is corroborated not only by the reasonableness of the thing, but by the only evidence presented thereabouts, viz: the document presenting the *facts admitted* in the case (folio 189) and the deposition of Cad. Jones, (folio 152.)

Mrs. Allen J. Davie died September 27, 1843.

The first named *four* plaintiffs (omitting the husband of one of them) are grandchildren of said Allen J. Davie, by his son William R. Davie, who survived his father, and died in January, 1854, (folio 10.) The other five plaintiffs (omitting the husband of one of them) are children of said Allen J. Davie, and have long been non-residents of North Carolina. Of these, A. J. Davie was born in 1825; Sally J. Burton was born in 1825, and married to her present husband in 1854; Rosa B. McKenzie was born in 1828; Julia Evans, in 1831; Octavia Huggins, in 1835; and F. W. Davie, in 1842, (folios 10 and 189.)

The plaintiffs have *elected* to claim a share in the proceeds

of the sale of the lands made by Beckham and others, instead of the lands themselves, (brief of appellants, folio 27;) and their present contention is for such share, together with an account of the profits made by mining previously to the sale.

The sale so spoken of took place on the 22d of June, 1853, (folios 110, 115,) and whatever mining profits there were were made previously to that date.

Waiving for the present any criticism upon the title of the plaintiffs, under conveyance from F. W. Davie, let us consider their claims to the relief sought.

The bill alleges that their trustee, Jones, was a tenant in common with Beckham, Briggs, &c., and so that they are entitled to share in the profits of the *common* property, whether from mining or sale.

The principal points relied upon by the defendants are:

I. *That upon their own showing the plaintiffs are barred by the North Carolina Statute of Limitations;* and

II. *That upon the record, admitting the deed to Cad. Jones as trustee for Allen J. Davie and his family, to have been duly executed, no case is made out against the defendants.*

I. I will enquire, first, what is the effect of the N. C. Statute of Limitations upon the case thus stated?

This may be considered with reference to the plaintiffs: 1st, as if unembarrassed by the circumstance that they were *cestui que trusts*; 2d, in connection with such circumstance.

1. Supposing that the plaintiffs had not been *cestui que trusts:*

(a) *As regards the mining operations.*

[(1.) It may be remarked in passing that the personal representative of Allen J. Davie is entitled to share in the

mining profits, if any there were, for those operations were in his lifetime, and as his was the hand entrusted by the deed *to receive and receipt* for the whole of them, his personal representative should have been made a party to the bill. A like remark is true, more extensively, as to the personal representative of the trustee, Jones.]

(2.) The four first named plaintiffs, (children, as above stated, of W. R. Davie, deceased,) are barred by the statute, *which had begun to run against their father before his death, and so continued to run against them although at his death mining.*

At the time of the filing of the bill, (July 11, 1874,) deducting the time allowed, in N. C., for the war, &c., (Sept. 1, 1861, to January 1, 1870, see Johnson *vs.* Winslow, 63 N. C., 552,) more than 12 years have run against their claim.

The case is to the same effect against the plaintiffs, *N. J. Davie*, who in June, 1853, was 28 years of age; *Sally J. Burton*, who at that time was unmarried and also 28 years of age; *Rosa B. McKenzie*, who was then unmarried and 24 years of age; and *Julia Evans*, who was then unmarried and 21 years of age.

Octavia Huggins, another plaintiff, married in 1854, before she had came of age, but lost her husband in 1868, so that, counting from January 1, 1870, three years and a half had run against her claim before the time of the filing of the bill.

The only other plaintiff is *Thomas W. Davie*, who became of age in 1863, and, like Mrs. Huggins, has been liable to the running of the Statute of Limitations since January 1, 1870.

As it seems that, supposing the defendants to have been tenants in common with the plaintiffs, that connection ceased from the time of the sale, in June, 1853, it follows that, in

regard to the mining profits, each one of the plaintiffs is, upon his own theory, barred from recovering by the three years' statute of limitations in force in North Carolina.

Wagstaff *vs.* Smith, 2 Dev. Eq., 264.
Saunders *vs.* Gatlin, 1 Detv. & Bat., Eq., 86.

(b) *In respect to the proceeds of the sale.*

Inasmuch as the plaintiffs have *elected* to proceed for the money, it appears that they are met by the same state of facts and a like objection of the Statute of Limitations.

It follows that the plaintiffs are all barred, even supposing them not to be embarrassed by the non-action of their trustee.

Some stress is laid in the brief of the learned counsel for the plaintiffs upon the fact that the plaintiffs are and long have been non-residents of the State, as if thereby they had been *beyond seas*, within the exception of the North Carolina Statute of Limitations. But in North Carolina it has always been held that residents of other States of the Union are not *beyond seas* within that exception.

Whitlocke *vs.* Wharton, 2 Murphy, 23, (1811.)
Earle *vs.* Dickson, 1 Devereux, 16, (1826.)
See Phillips *vs.* Cameron, 3 Jones, 390, (1856.)
Green *vs.* Neal, 6 Pet., 291.

II. But the plaintiffs are *cestui que rustst*, and so are bound as regards both *profits* and *proceeds of sale*, by the laches of their trustee.

The general rule to that effect is admitted, but it is said that where the *cestui que trusts* are such as to an estate *in remainder* the statute does not run as to their interest *until it has accrued.*

The case cited and criticised by the learned counsel for

the plaintiffs (6 Jones, 328, brief, p. 66) shows that this distinction is not observed in North Carolina.

However, this case presents no opportunity for discussing it, for it is plain that the children of Allen J. Davie did not take as *cestui que trusts in remainder*, but took *jointly* with their parents; the only effect of the successive deaths of the latter being to put an end to their respective fractional interests for the benefit of the children.

All of the children then stand upon the same footing as to time, being barred because their trustee was barred.

But the question whether the children took in remainder has in fact very little interest in view of the circumstance that Allen J. Davie died in 1851, *i. e.*, *before the sale*, his wife having died some years earlier. The learned counsel for the plaintiffs has ingeniously suggested in his brief that such deaths occurred at the end of seven years from the time of his disappearance. But he is met by the circumstance that *there is no rule of law as to the time within the seven years at which one who had disappeared is presumed to* have died. The only suggestions in the books upon that point concur with what the plaintiffs and their witnesses have suggested here *upon the record*, and point to December, 1851, or thereabouts, as the time of such death.

II. Upon the record, admitting the deed to Cad. Jones as trustee for Allen J. Davie and his family, to have been duly executed, no case is made out against the defendants.

The record shows that the defendants, M. L. and R. J. Holmes, who, upon that side, are the parties principally interested in this matter, first became connected with this land in June, 1850, under a lease assigned to them by Briggs, and received by the latter from one Beckham on the 9th of April before. (Folios 88 and 86.) This lease was for an undivided two-thirds part of the tract. It rested upon two deeds which Beckham had obtained (folios 122

and 126) from F. W. Davie, already mentioned as having conveyed an undivided one-third of the same land in 1833 to Allen J. Davie. These deeds were ordered to be registered at February term, 1852, of the county court of Guilford county, in which the land lay. (Folio 130.) At the time of assigning the above lease, one Gluyas, a resident of the neighborhood, claimed to own the other one-third undivided part of the land, by deed (dated January 8, 1848,) from one McCulloch, (folio 101,) who, on the 1st of January, 1831, had purchased it from the said F. W. Davie. (Folio 97.) There is nothing in the record or in the brief for the plaintiff to impeach the validity of the Davie-McCulloch-Gluyas conveyances.

By the terms of the lease Briggs bound himself to pay Beckham for rent one-half of two-thirds of all the gold obtained from the land; and, in consideration of the assignment to them, M. L. and R. J. Holmes paid to Briggs $900, and besides, by its terms, became *subject to the conditions and cosenants* of the lease.

On the 17th of February, 1852, (folio 107,) Gluyas conveyed his share in the land to the defendants, Sloan and M. L. Holmes, together with one Peters, who since is dead, his estate being now insolvent.

It will be recollected that the deeds from F. W. Davie to Beckham were ordered to be registered in Guilford county about the same time, (February court, 1852.)

In June, 1852, Holmes and his co-owners sold their undivided one-third, together with their lease upon the other two-thirds to the Belmont Company (folio 110,) this being the sale the proceeds of which are now in controversy. At the same time (folio 115) Beckham sold to the same company his interest therein, viz: the *reversion* in two-thirds of the same tract, *i. e.*, a right to one-seventh of two-thirds of the product of gold during the lease, which was to end April 4, 1858, and to the possession of said two thirds after that time. The deeds were several. It is evident that the

lessees, Holmes and Beckham, understood each other as to the amounts to be received by each out of the round sum of $125,000 agreed to be paid by the Belmont Company, inasmuch as what the former received for their lease and one third of the land, was two thirds of the price; and what the latter received for their rent and prospective possession of two thirds of the land was one third of the price. It would be enough to say as regards this distinction that it was agreed upon by men whose capacity to judge of its propriety has not been questioned. But in North Carolina in that day, and ever since, as in more distinguished mining regions recently, the *present possession* and *immediate returns* of mines were valued far above what might be expected some years afterwards. The fluctuating character of such property is illustrated by this very *McCulloch mine*, as it was called, in North Carolina. It seems to have been quite an object of desire about the year 1830. Mr. Allen J. Davie then thought *that there was enough gold in it to pay the British debt.* (Folio 153.) In the course of ten years, however, it was abandoned by him! After ten years more, its veins having been duly *developed* and *exposed to view*, (folio 54,) it is again much sought after. The owners, however, seem prudently to have distrusted its *staying* qualities, and to have recognized the fact that he among the vendors who owned the immediate interest was he who had the right to the greater part of the consideration—the point being *to sell, and sell at once!* North Carolinians were not so enterprising in literary matters as to make their observations upon gold mines a basis for impressive additions to the language, but *the thing*, "petering out," was well known in their State long before California had enriched our vocabulary with *the phrase.*

What is to be observed, however, is that in selling their one-third part and lease, the Messrs. Holmes' did nothing of which anybody had a right to complain, and nothing of which any other person interested in the land could ask an account.

For, how can one tenant in common ask an account from a co-tenant because of what he has received as consideration for the sale of his *undivided share?* Was it not his own; and did he not, therefore, have a right to deal with it in this way *at pleasure?*

The learned counsel for the plaintiff makes observations in his brief upon the character of the successive deeds by which the title to that one-third lease came to the defendants, viz.: that they were only *quit claims*, and contained *restricted* warranties only. But how is that important in a case where, as here, the title which the deeds conferred is undisputed? *There is no controversy here as regards the title to the McCulloch-Gluyas-Holmes third of the land.* Admitting that the contents of those deeds put the successive bargainees upon notice lest the title conferred might not be valid, such notice is superfluous if it turn out that the title is unimpeachable.

So far, then, as concerns the one-third sold by Holmes and others to the Belmont Company, the complainants are not interested either in what was sold or in what was received.

How is it in regard to the lease (then having six years to run) which constituted the remainder of what Holmes sold and was paid for? Are the complainants interested in that, so as to ask an acount of the price received?

That term originated, as has been said, in an indenture between Beckham and Briggs, dated April 9th, 1850, and had been assigned by the latter to Peters and Holmes, by deed of June 12, 1850, the assignees paying therefor $900, and agreeing to be subject to its conditions and covenants.

At that time Beckham had deeds from F. W. Davie for the two *third parts* which he so leased.

I suppose that it will be admitted that for any period after that at which Holmes reassigned such lease he is not answerable to the plaintiffs. For what he sold thereby was only his position as assignee of a lease, the effect of which

was that the purchasers became themselves lessees, standing in the shoes of Briggs, the original lessee.

An assignee of a lease sustains, as such, but one sort of privity with the original lessee, viz.: *privity of estate.* It is upon that privity alone that he can be sued by the landlord for rent, &c. No doubt that by special agreement he may subject himself to *privity of contract.* But, as regards the former sort of privity, it disappears upon any reassignment that he may choose to make, even to a person insolvent.

1 Wms. Saund., 241c, n. e.

It is only through supposed privity of estate that the plaintiffs can claim that Holmes and others are responsible to them *as real owners,* for rents and profits due on account of the supposed *Allen J. Davie third* of the land in question. That privity arose upon their purchase of the lease from Briggs, and was transferred upon its sale by them to the Belmont Company. For any period after that sale this privity attached to this company alone.

II. In regard to the privity of estate that may be supposed to require that the defendants shall account with *the real owners* of the *Allen J. Davie third* for such profits as were made during their occupation of the mine, viz.: from June, 1850, to June, 1853, it seems evident that it cannot be made avail of in a case where those real owners *stood back and gave no notice of their claims during any part of the time that such occupation existed. The Allen J. Davie family* never registered their deed, and had abandoned the property and the State some years previously. They did not intervene again until after Holmes and his associates, and Beckham, had executed deeds for the mine to the Belmont Company. There is no pretence in the bill or in the evidence that Holmes had not then settled with Beckham or Briggs for all that was due on account of the gold taken from the mine during the two years above specified. If

the plaintiffs have lost anything in this way, it is because of their laches in taking no note of the property for years, and until innocent third parties had become involved in transactions thereabouts. Under such circumstances equity will not suppose a privity of estate between them and such third persons, but will rather presume some effectual *pro tanto* abandonment by the landlords, in order to defeat their claim.

It will be borne in mind here, that, as has been already said, the notice shown to have been given by the plaintiffs, through Mr. Jones and Mr. Gorrell, (July, 1853, folio 79,) was not given before Holmes had settled with Briggs or Beckham, for gold taken at between June, 1850, and June, 1853, (supposing there were any,) but only before the money due by the Belmont Company *on account of their purchase of the land and the lease*, had been distributed betwixt Beckham and Holmes. That the plaintiffs had no interest whatever in the money received by the defendants upon that account has already been argued. So such *notice* was vain.

I conclude that, granting that the plaintiffs ever had and in 1850–3 retained a legal title to the *Allen J. Davie third*, they cannot, *because of laches*, enforce such title in equity as regards a mesne transaction like that by which the defendants, during two years, worked the mine.

Besides this objection in equity, it remains to say that after the sale by F. W. Davie and Beckham, of the Allen J. Davie third, and Beckham's entry thereunder, the previous *estate* of Allen J. Davie was turned into a *right*, and required to be reverted before becoming in privity with that of any person upon the land.

See Hardy *vs.* Williams, 9 Iredell, 177.
Clymer *vs.* Dawkins, 3 How., 674.

As for the agreement by Holmes and others, *to become subject to the conditions and covenants* of the lease assigned to

them, in the first place it created no privity of contract between them, and even Beckham, much less with any one in the back ground, a supposed owner of what was claimed by Beckham. The other party to the contract, he who alone could enforce it, was Briggs. But waiving any objection to Beckman's intervention to enforce such agreement at law or in equity, I submit that it is clear that after Beckham had admitted, by words or acts, that his claim thereunder was satisfied, it was at an end for all purposes.

Beckham's share in the transaction of sale to the company, no less than the part assigned to him by the bill in the general affair, is inconsistent with an hypothesis that there remains anything unsettled betwixt him and Holmes because of rent due by Briggs for gold taken out of the mine. Neither the bill nor the testimony suggests any such condition of things. On the contrary, the paper executed by Beckham on the 28th of April, 1854, introduced as evidence by the plaintiffs (folio 177) explicitly states that such rent *had been paid* to him; and that paper was accepted by the plaintiffs as a basis of any further claims by them.

I conclude that there was neither privity of contract nor of estate betwixt the plaintiffs and defendants, either in respect to the lease assigned to the latter by Briggs or in respect of the possession of the land which followed.

The counsel for the plaintiffs has discussed with much learning the effect upon a title to land in North Carolina of the non-registration of the conveyance, and also of the bearing of the evidence in this case upon the question whether the deed to Allen J. Davie was ever executed at all. These points also occupy a large place in the Opinion of his Honor in the court below. I deem it unnecessary to suggest anything more upon the former point than that this is no suit for the re-execution of such supposed unregistered conveyance,

and therefore that any evidence of its contents is incompetent; also, that if people choose to retain their deeds in their pockets without registration they cannot convert such habit into a snare for innocent parties, inducing them to incur obligations and change their condition as if the unregistered deed had no existence, and then suddenly assail them whilst so encumbered. Such parties may not lose their title to the land entirely, but they will at all events retain it subject to the salutary doctrines of estoppel in pais. As for the question whether such a deed ever existed, I leave that chiefly to the observations made by his Honor below. It has not seemed to me to be material, and being a matter of mere probabilities, with evidence upon both sides, I have preferred to put the case of the defendants upon those plain principles of law which, as I submit, govern it upon every theory as to the existence of that unregistered deed.

To one much observant of such transactions I think that the general features of the case will suggest that Allen J. Davie may have been a speculating, improvident, and, perhaps, embarrassed man. His brother, F. W. Davie, who seems to have been a monied and generous man, insisted upon taking a quasi mortgage from him and his family for a debt of some $459. He was not able to control the possession of the deed when needed in a suit which he had been carrying on for several years, and then pending in the supreme court of the State. The paper was peculiar in form, combining his wife and his children, born or to be born, as immediate beneficiaries with him. It contained a trustee, and was never registered; and, besides, Mr. F. W. Davie sold the land again—his two deeds to Beckham, in March, 1850, exhibiting very different convictions of duty towards his two brothers in regard to this land. On the other side are the presumptions from the attestation clause, and the evidence that Mr. Jones thought he had once seen it in the hands of Allen J. Davie. All this, under the circumstances of the case, suggests that F. W. Davie retained the

paper to protect its beneficiaries against the debts or further improvident acts of his brother, and that it was not registered as a caution against creditors.

There is no clear, positive evidence that it ever went into the hands of the Allen J. Davie family until after the death of F. W. Davie, when exhibited by Dr. W. R. Davie. Nor is there any evidence that the trustee knew of its existence, or consequently acted thereunder until after that time. If F. W. Davie retained the deed with his brother's consent, or if with that consent it was never registered for purposes, like those above suggested as appearing upon the record, it will make the case of the plaintiffs here but the more desperate. An intentional suppression of the evidence of their title, for any purpose, makes its resurrection, to the effect proposed here, impossible.

Nor do I apprehend it to be important formally to discuss what is said or quoted upon the question of *notice* in general, as affecting the defendants. Mr. Holmes and his brother first answer and then testify that they had never heard of the claim of Allen J. Davie or his trustee to the land, until after they had sold it. (Folios 56 and 183.) They first heard of the land, and came into its neighborhood, in 1850, some *eighteen years* after Mr. Davie had finally left it, and about *ten* after he had left the State. Nobody testifies that they were ever notified of that claim before they had bought and again sold the land. The evidence of Messrs. Coffin and Mendenhall, as to an understanding in the neighborhood, is not brought home to them, and, as I submit, evidently points to the antecedent time at which Mr. Davie was living there, that is, previously to the year 1833. The evidence does not state exactly when he left *the State*, but it was about the time that he lost his suit in the supreme court. At any rate, as it was for the plaintiffs to show that there was an understanding in the neighborhood as to the

rights of Allen J. Davie, *after the defendants came there*, and whilst they were in occupancy, they must suffer for any want of particularity of the evidence in that respect. *Mr. Coffin* is asked what *was and is* the report upon that subject? He replies as to what *was*, and says no more, and is not pressed to do so. *Mr. Mendenhall* left that neighborhood himself in 1841, and although he says that at the time of the sale, in 1853, there was an understanding that Allen J. Davie's children were interested in it, the date thereof (somewhat vague) renders it unimportant, and expressly is not brought *home to the* defendants.

I will conclude with a few observations upon the occurrences at Greensboro', in 1853, after the sale.

A great deal of importance is assigned to the paper there executed by Beckham in relation to the Allen J. Davie claim.

I submit, that it is plain, as heretofore stated, that the defendants and Beckham did not mix up their interests in the sale made to the Belmont Company. Each party acted for themselves. They dealt at arm's length, both as regards the conveyances and as regards the division of the price.

After the sale had been made, and whilst the consideration was *in transitu*, counsel for the Allen J. Davie heirs appeared and prevented its distribution. Thereupon, after negotiation, the following instrument was drawn:

STATE OF NORTH CAROLINA,
Guilford County.

Whereas Peters, Sloan & Co. held one-third of the McCulloch gold mine, in Guilford county, under John Gluyas, Charles McCulloch, and William F. Davie; and whereas they had a lease from Lewis A. Beckham, in his own right, and as trustee of Mrs. Julia Bedon, for two-thirds of said mine for a period the lease will show; whereas said Peters,